University of Alberta

Language Rights and Judicial Wrongs: Official Bilingualism Jurisprudence in Canada's Provincial Courts

by

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Chapter One: Language Rights, Official Bilingualism and National Unity

Introduction

Since long before Confederation, the French-English question has been the most critical issue in Canadian politics. As the area that is now Canada has had substantial French and English-speaking populations since the late eighteenth century, the search for an appropriate institutional and political balance to allow these two communities to co-exist peacefully and prosperously has been constant in Canadian public life for over two centuries. While French and English Canadians have generally managed to co-exist peacefully throughout Canadian history, efforts to accommodate both groups in an arrangement amenable to all have not been entirely successful and Canadians continue to grapple with language issues to this day. For most of Canada's history, this debate has taken place in the political realm, with issues surrounding the place of Québec and other French speaking communities in a predominantly English speaking country being a top priority. However, the judicial realm has also been an important theatre as linguistic and cultural rights guaranteed in the constitution and in statute have often been adjudicated in the courts.

Since the 1960s, this debate has intensified significantly as a viable separatist movement arose in Québec which still threatens to tear Canada apart. This separatist movement appears to be the greatest threat to unity that Canada has seen since the period immediately following confederation. In response to this threat, Canadian governments have advanced a number of strategies to maintain unity, the most important of which has been the policy of official bilingualism. Seeking to strengthen bilingualism and reinforce it as a unity strategy, Canadian policy makers have entrenched a number of bilingual language rights into the constitution and have passed a number of others in federal and provincial legislation.[1] If they applied properly, it has been argued, these language rights have potential to strengthen bilingualism and help maintain national unity in Canada.[2] However, for this strategy to have any chance of success, it requires the support of the judiciary as the courts must interpret them expansively for the strategy to succeed. The entrenchment of this policy has thus made the Canadian judiciary an even more fundamental player in Canadian language politics.

One of the important ways in which the policy of official bilingualism was intended to revolutionize Canadian politics and ensure national unity was to make Canadian governments (both federal and provincial) more hospitable to official language minority groups, particularly francophone communities in predominantly English provinces. While the federal government has taken a number of important steps to make itself more hospitable to francophones, it has been less successful in convincing its provincial counterparts to do the same. However, Ottawa has encountered some success in this endeavour as several provinces have adopted measures to support their official language minorities. Indeed, several provinces have adopted statutory or, in rare cases, constitutional language rights and other provisions to foster the preservation and development of their official language minorities (in addition, some language rights applicable to the provinces remain in effect from earlier constitutional documents). As such, the bilingualism regime which was designed to secure national unity has considerable scope throughout Canada. Of course, the judiciary is frequently called upon to interpret and uphold the constitutional and legal provisions that comprise this regime.

While the courts have been entrusted with a critical role in the maintenance of Canadian unity, the architects of this unity strategy had limited control over how the courts would respond to their new role. Those federalists who designed the strategy hoped that the courts would interpret language rights in a liberal and purposive way for the benefit of official language minority litigants and communities. However, the Canadian judiciary has failed to do so consistently, much to the consternation of the minority groups and some federalist politicians. As we will see, Canadian courts, both federally (including the Supreme Court of Canada) and in the provinces, have interpreted language rights with a great deal of inconsistency, sometimes in favour of the minority communities and official bilingualism, sometimes in favour of the majority and a unilingual policy regime.

In 1999, however, in the case of R. v. Beaulac,[3] the Supreme Court adopted a new approach to the interpretation of language rights. It mandated that language rights "must in all cases be interpreted purposively,"[4] (emphasis in original) in order that they can effectively play the role envisioned for them by the architects of the official bilingualism policy: "the preservation and development of official language communities."[5] This

decision was precisely the sort of interpretation that the federal architects of official bilingualism had always hoped the Court would adopt and appeared to be a clear expression of the bilingual vision that such federalists espoused. This new approach, they hoped, would eliminate much of the inconsistency and confusion related to language rights in Canada and would result in language rights interpretation which would benefit the minorities and the official bilingualism scheme. It was also hoped that this new approach would have particularly positive results in language rights interpretation in provincial courts, where the majority of language rights litigation takes place. However, whether the provincial courts would follow this new approach was not clear, given the varied precedents on language rights issues.

In many ways, Canada currently finds itself at an important time in its ongoing language politics debate. Support for the sovereignty option remains relatively strong in Québec, as was evidenced less than nine years ago when voters in that province defeated a motion to secede from Canada by an extraordinarily narrow margin. This indicates that the threat to Canadian unity from the Québec separatist movement generally remains very real and severe. As well, after years of struggling against assimilation, official language minority groups have made some small but significant demographic and political advances in recent years.[6] In addition, in the current era of neo-liberalism, Canadian governments appear to have less ability and appetite to engage in social planning activities such as supporting official language minority groups. For all of these reasons, the current era is an extremely important time for the Canadian language debate and for Canadian unity in general, as the developments of the next few years could determine the ultimate success of the Canadian national unity project. Thus, if language rights are to have much potential to strengthen Canadian unity as the architects of the bilingualism policy hoped, the role of the judiciary in interpreting language rights is vitally important at this time.

Scope of the Examination

May 20th, 2004 marked the five-year anniversary of the Beaulac decision. While the Supreme Court has not decided any other significant language rights cases since that crucial precedent in the realms with which we are concerned,[7] language rights adjudication has continued in the provincial courts. Accordingly, it is there that the

Beaulac decision has had the greatest potential to leave a significant impression. In the five years since the decision, there has been more than sufficient time for language rights cases to be heard and decided in provincial courts and these courts have had ample time to implement the orders mandated by the decision, specifically, to always interpret language rights liberally and purposively. Therefore, now is an appropriate time to examine the jurisprudential development of language rights in provincial courts (and the effects of the Supreme Court's approaches on that development) and the way in which these provincial courts have followed Supreme Court precedent.

Because language rights have been seen as a means to secure national unity by the federal government, one of the main objectives of this study will be to determine the extent to which this federal position has been embraced by the judiciary since the release of Beaulac. The primary research question we will attempt to answer will be how the courts of the provinces have interpreted language rights in selected fields and what effects this interpretation has had on the policy of official bilingualism. Answering this question should provide considerable insight into the extent to which this federal unity strategy has succeeded in recent years in the fields with which we are concerned.

Another important issue that will be examined relates more generally to the behaviour of provincial courts. With the Supreme Court only able to deal with a limited number of language rights issues, the courts of the provinces are generally left to resolve the majority of linguistic disputes. Therefore, in looking at provincial court jurisprudence in this area, we will gain insight into the effects of such courts on public policy. Perhaps more importantly, we will also examine the way in which provincial courts follow the decisions of superior courts. Common law principle dictates that lower courts are obligated to follow and apply the precedents of higher courts. As we will see in the following chapter, however, the Supreme Court has been varied and inconsistent in its approach to language rights interpretation which provides poor guidance and considerable flexibility to the provincial courts for their interpretation of linguistic disputes. Therefore, in this study, we will also examine how the courts of the provinces have followed the inconsistent precedents which the Supreme Court has provided.

In order to examine these issues, we will scrutinize language rights decisions provided by provincial courts according to certain policy considerations. We will analyse

every (to my knowledge) provincial court language rights judgment rendered since the release of Beaulac within certain sub-fields (described below) and classify them according to a categorization I have created. This categorization measures the liberality or restrictiveness of a judgment vis-à-vis the bilingualism policy regime of a province which will allow us to measure the impact that the decision has on the policy (it will also reveal how closely the courts have followed the Beaulac precedent). The net result of the entire body of provincial court jurisprudence will allow us to determine the larger effects of this case law on the official bilingualism regime in Canada.

Examining these issues in this fashion is important and worthwhile in a number of ways. In exploring questions related to the development of bilingualism through provincial court language rights jurisprudence, this examination will allow us to make a contribution to the ongoing scholarly debate in this area. Such a contribution will provide an update to the debate, one that is much needed as the debate appears to have fallen silent in recent years in English scholarship as other political issues seem to have taken on greater priority for many writers. The need for such an update is especially great as little scholarly attention has been paid to these issues in English in the wake of the crucial Beaulac precedent. This contribution will also shed light on how the issues of language rights and bilingualism play-out in the provinces where they are not always the subjects of significant attention (as they often are nationally). Our analysis is also important in terms of its exploration of the behaviour of provincial courts. In looking at how the Beaulac precedent has been applied in these courts, this study will make a contribution to the literature related to lower courts and their application of superior court precedents, an issue which is in need of further exploration in the Canadian political science literature. Such a focus will also provide edification on the role of the judiciary in public policy issues in general, particularly the role of the provincial judiciary. For all of these reasons, therefore, this study should yield interesting insight and provide important input into a number of scholarly debates.

As alluded to above, in pursuing our jurisprudential analysis, only certain types of rights will be considered. There are a number of sub-fields of language rights which have been deemed to be important to the maintenance of national unity, all of which are interesting and important to a general discussion of bilingualism. However, in this

examination, we will be limiting our analysis of language rights interpretation and jurisprudence to four specific sub-fields related to provincial jurisdiction: i) rights to provincial government services in the minority official language, ii) rights to bilingualism in municipalities, iii) legislative language rights and, iv) legal language rights. The reasons for pursuing these four sub-fields of bilingualism relate both to their importance to the bilingualism issue and the relative lack of attention paid to them in previous scholarly analyses of language rights jurisprudence. Each of the four sub-fields has been the source of controversy both in and out of the courtroom and each of the sub-fields contain contested legal terrain in which bilingualism can be affected by the judiciary.

Part of what makes these four sub-fields important to bilingualism in Canada is that they each fall under, or relate closely to, provincial jurisdiction. As will be discussed later, several aspects of provincial jurisdiction are critically important in the cultural-linguistic sphere, which means that they are important to the vitality of official language minority groups. However, unlike at the federal level, where official bilingualism has been relatively successfully entrenched, the commitment to bilingualism varies greatly across the provinces, as it is often much more controversial there than in Ottawa. Even in the provinces where the commitment to bilingualism is fairly strong (as is the case in New Brunswick), there are still many contentious aspects of the issue which sometimes result in litigation. As it is the provincial judiciary which is often the final arbiter of disputes related to these aspects of bilingualism, the courts in the provinces are thrust into an extremely important role. It is thus important to examine the role that the provincial courts play in adjudicating linguistic disputes related to provincial jurisdiction.

An examination of bilingual government services, municipal bilingualism and legislative language rights is especially important in the context of provincial jurisdiction, due to the role each field plays in the fostering of linguistic minority cultures in the provinces. Legislative language rights is among the most important sub-fields of bilingualism in provincial jurisdiction, due to its symbolic value. In those provinces where legislative language rights apply, the right to use either official language in the legislature and the duty to publish legislative documents in both languages allows the minority linguistic community to be included in one of the most important institutions and in the highest law-making activity of the province. The symbolic value of this

inclusion confers a great deal of official legitimacy on the minority language and the minority language community. In a practical sense, such rights also permit members of the official language minority community to maintain their language when dealing with a critical institution in the provincial society, which provides another important venue in which their language can be maintained rather than abandoned.

Bilingual government services play a similar symbolic and practical role. By providing government services to an official language minority community in its language, a province judges that community to be legitimately deserving of special treatment. This provides the community with a degree of legitimacy which strengthens it a great deal. Such rights also allow the community to maintain its language in dealing with government agencies, rather than having to abandon its language and culture when doing so, as is often a feature of more colonial or paternalistic relationships. This provides it with the opportunity to receive government services, services which are often so important to the health and vitality of a community, without having to use the majority language. These language rights are therefore highly important to the linguistic minority communities and can be said to be among the most important language rights in Canada.

Bilingualism in municipalities provides other practical benefits, as such rights allows citizens to live comfortably, and receive services from the government closest to them, in the official language of their choice. In bilingual municipalities, official language minorities can use their language in a number of practical situations (such as in a city recreational programme) which are important daily activities in which the minority language is not necessarily abandoned. Local governments, which fall under provincial jurisdiction, thus provide another important opportunity for minority language communities to use their language in an official capacity and maintain the fundamental tenet of their community, their language. Bilingualism in municipalities can also be symbolic.

Legal language rights are slightly different than the other three types but are equally (if not more) important. They are different because not all of these rights are strictly under provincial jurisdiction. Because the legal system in Canada is an integrated federal-provincial system, there is a degree of federal activity in provincial courts which relates to legal language rights. For example, one of the most important legal language

rights, that which gives the criminally accused the right to a trial in the official language of their choice, is derived from a federal statute, the Criminal Code. However, because the provinces are responsible for prosecuting Criminal Code offences in provincial courts, these language rights fall to the provincial courts to interpret (as do legal language rights passed by provincial governments). Therefore, in spite of the national nature of some legal language rights, it is still the provincial courts in which these rights are interpreted.

Legal language rights (both federal and provincial) are important to bilingualism in a number of ways. The ability of litigants to speak their preferred official language in the legal realm is important because, as with the other institutions we have discussed, a great deal of legitimacy is conferred upon a language if it can be spoken in an official state institution like the courts. As Denise G. Réaume summarises: "the operation of public institutions in a minority official language...[makes] the state and its institutions full participants in the life of the [minority] community, and the members of the group full participants in public life. Thus, the importance to a community's self-respect, and hence to its linguistic security, of access to public institutions is enormous."[8] This is particularly true in an institution such as the courts in which verbal communication is so fundamentally important. With the right to use either official language in the legal realm, users of the minority official language are not only granted the legitimacy that recognition in public institutions provides, but are also free from having to abandon their language in their interactions with the law, which is the institution that provides justice in society. For purposes of social justice and symbolic legitimacy, therefore, rights that allow usage of both official languages in the courts are extremely important. The ability to use either official language in the courts is all the more important as much of the rest of the bilingualism regime is provided through language *rights* which inherently brings minority litigants into the courts. In addition, legal language rights are important in the bilingualism debate because many of the crucial language rights precedents, such as the monumental Acadiens and Beaulac cases, have been decisions relating to legal language rights. Therefore, legal language rights are crucial to gaining a complete understanding of the language rights issue. For all of these reasons, each of these four sub-fields of provincial jurisdiction is vitally important to the preservation of official language

minority communities, such that the role that the judiciary plays in interpreting language disputes in these fields will have an important impact upon the maintenance of those communities and the advancement of bilingualism itself.

While it is clear that the study of these four sub-fields is warranted due to their importance to the bilingualism issue, the other main reason for studying these sub-fields is that they have not been the subjects of a significant amount of academic scrutiny, as have most of the other sub-fields of the language rights debate. While sub-fields such as bilingual education rights and bilingual federal government services rights tend to have been well-covered in the academic commentary, the fields covered in this examination have been the subjects of considerably less attention in spite of their tremendous importance to the bilingualism issue. It is likely that they have garnered less attention because of the variability of provincial bilingualism regimes across Canada and due to the mistaken belief that provincial court language rights jurisprudence is somehow less important than Supreme Court jurisprudence (in spite of the fact that the Supreme Court interprets only a fraction of the language rights cases that appear before the provincial courts, leaving the provincial courts largely in control of the development of language rights). Regardless of the reasons for this lack of scholarly attention, the fact these sub-fields have not been covered sufficiently, in combination with their great importance for official bilingualism, warrants a detailed analysis of these fields. Therefore, they will be the primary focus of this study. While the fields not covered in this study are sometimes closely related to the fields we are examining and are certainly important for gaining an understanding of bilingualism in Canada (and will therefore be mentioned in the context of our exploration of official bilingualism and language rights jurisprudence), the case law related to them will not be analysed in much depth.[9]

National Unity and the Roots of Official Bilingualism in Canada

The roots of the contemporary national unity and language rights debate can be traced far back in Canadian history. With two main linguistic groups populating the area that is now Canada for over two centuries,[10] the potential for conflicting interests and linguistic animosity has been significant. While efforts to formulate an institutional basis which would allow both the French and English linguistic groups to peacefully co-exist date back long before confederation,[11] in 1867 a new arrangement was established which

was supposed to bring an end to linguistic conflict in British North America. That year, the Dominion of Canada was created with the *British North America Act* (now called the *Constitution Act, 1867*) serving as the new country's constitution. To many Canadians, particularly French Canadians, the country that had been federated was to be a dualistic, bilingual one.[12] To them, the confederation agreement was a pact between two peoples and they felt that both the French and the English were bound to respect the other which included respecting the linguistic minorities in the provinces. To proponents of this viewpoint, the text of the new constitution lent some credence to this notion, particularly s. 133 which holds that the Parliaments and courts of the federal and Québec governments must be bilingual.[13] To those who felt that the fathers of confederation had intended to create a bilingual and dualistic Canada, this constitutional provision, as well as the spirit of the pact itself, proved their argument.[14]

Whatever the intentions of the framers of the confederation pact on the issue of duality, they were unsuccessful in creating national harmony in Canada as linguistic conflict was common in the late nineteenth and early twentieth centuries (to contemporary political scientists, these disputes are often seen to be linguistic in nature. While language was certainly an important factor in some disputes, in many instances, the conflicts related more to religion than to language[15]). A number of incidents such as the hanging of Louis Riel in 1885,[16] the refusal by the federal government to entrench and strengthen bilingualism in the prairie provinces[17] and two conscription crises led to continued tension between Canada's French and English communities. Socio-linguistic peace had proven to be an elusive goal in Canada, in spite of the confederation agreement. With this continued tension and with the onset of the 'Quiet Revolution' in Québec in the 1960s, nationalism in that province increased dramatically which resulted in the creation of a strong and viable separatist movement. This movement was of great concern to many Canadians who sought the continued unity of the country (not least of whom were policy makers in the federal government). However, concerns reached a fevered pitch in 1976 when the sovereignist Parti Québécois (PQ) won the Québec provincial election and gained political office under its charismatic leader, René Lévesque.

For every government in the world, the maintenance of the regime is the highest priority. For obvious reasons, it is in the interests of any national government to maintain national unity and the stability of the government in the polity. This principle is particularly true of the governments of capitalist countries who generally stand to lose a great deal economically if the country fragments. Accordingly, beginning in the 1960s, the federal government has taken the separatist threat in Québec very seriously and has adopted a number of strategies to deal with it.[18]

One of Ottawa's first steps to counter the separatist threat was to acquire more information. Accordingly the federal government established a Royal Commission in 1963 to study the socio-linguistic make-up of the country and to recommend possible federal responses to the challenges to national unity. With the release of its final report beginning in 1967, the Royal Commission on Bilingualism and Biculturalism laid the foundation for the language regime that Ottawa was soon to put in place. The Commission's primary recommendation was that the federal government implement a policy of official bilingualism which recognized the formal equality and official status of both French and English in Canada: "we take as a guiding principle the recognition [of the equality] of both official languages, in law and in practice."[19] The Commission made a number of other recommendations, including several which called for increased bilingualism in the provinces. The establishment of this framework was a critical factor leading to the linguistic policy which was soon to be developed.

Another of the strategies of the federal government to combat separatist sentiment in Québec in the 1960s was to increase the profile of francophones in the federal government. While this included some early efforts to increase bilingualization in the public service, it also included the drafting of three prominent Québécois federalists into the governing caucus in 1965. These three new MPs were Jean Marchand, Gérard Pelletier and most importantly, Pierre Elliott Trudeau. Few people have had such an important impact on Canada and on the federal government in the twentieth century as has Trudeau. His appointment and rapid rise through the ranks of the federal caucus soon led to the establishment of the most important federal policy to combat separatism and strengthen national unity, the policy of official bilingualism. This policy was one in which Trudeau had strongly believed for many years.

Before entering federal politics in 1965, Trudeau had written a great deal about his vision of Canada and of Québec's place within it. It was evident from his writings that he felt that the federal government needed to be fundamentally reformed in a number of ways. Unlike many of his peers in Québec, however, Trudeau did not feel that the goals of Québec nationalists, particularly the goal of a sovereign Québec, would be beneficial for Quebecers and Canadians.[20] He felt that nationalist movements based on ethnic or linguistic characteristics, such as that sweeping Québec during the time of his writings, were dangerous and illegitimate: "I believe that a definition of the state based essentially on ethnic attributes is philosophically erroneous and would inevitably lead to intolerance."[21] As an alternative, Trudeau advocated greater inclusion of French Canadians in the pan-Canadian nation, particularly in the institutions of the federal government. He felt that only Ottawa could speak on behalf of all French Canadians and that the government of Québec was not the appropriate representative of Quebecers: "From a constitutional point of view, the Quebec Legislature has no authority to speak on behalf of 'French Canada.'"[22] Trudeau's most important strategy for the attainment of national integration for French Canada was to make Canada officially bilingual.

Trudeau felt that the fathers of confederation had intended for Canada to be a dualistic, bilingual nation.[23] However, he felt that the rights in the *British North America Act* which promoted bilingualism were too limited and that bilingualism needed to be affirmed again in stronger terms.[24] He argued: "The right to learn and use either of the two official languages should be recognized. Without this, we cannot assure every Canadian of an equal opportunity to participate in the political, cultural, economic, and social life of this country."[25] This advocacy of bilingualism was an essential foundation of Trudeau's larger vision which entailed the patriation of the constitution from the United Kingdom and the entrenchment of a document to protect Canadians' human rights.[26] Trudeau sought to include the ever-important recognition of bilingualism within this bill of rights: "In addition to protecting traditional political and social rights, such a bill would specifically put the French and English languages on an equal basis before the law."[27] Particularly important in this entrenched recognition of Canada's dualistic nature would be an affirmation of the inclusion of French Canadians in the national, pan-Canadian project: "The constitution must be so worded that any French-speaking

community, anywhere in Canada, can fully enjoy its linguistic rights."[28] Trudeau's objective with this ambitious vision was clearly the maintenance of Canadian unity as he suggested that the entrenchment of official bilingualism would help solve "the basic issue facing Canada today."[29] Within a few short years of gaining political office, Trudeau would have opportunity to begin constructing this new linguistic edifice which has been so important in national unity politics ever since.

In 1968, Trudeau became Prime Minister of Canada and after gaining a sweeping mandate from the Canadian people in the 1968 election, he was finally in a position to implement his vision of Canada. In accordance with the recommendations of the Royal Commission on Bilingualism and Biculturalism, one of Trudeau's first acts as Prime Minister was to enact the Official Languages Act of 1969,[30] which recognizes and affirms the formal equality of the English and French languages in Canada.[31]

At the time of the Act's passage and, in many respects, still today, the rationale and strategic purposes underlying this policy were clearly to strengthen national unity in a number of ways.[32] In an effort to undermine the claims of Québec nationalists/ sovereignists who argued that Quebecers were not treated equally and fairly, the Official Languages Act made Canada's two main languages and their users officially equal, particularly in federal operations. It was hoped that if French-speaking Quebecers were made legally equal to English-speakers, the perceptions of inequality and injustice would diminish in Québec, which would eliminate some of the rationale for seeking Québec's independence. According to Rainer Knopff and Ted Morton: "For Trudeau and his disciples, achieving the symbolic and practical equality of French and English was to be the antidote to Québec separatism."[33] The Act also intended to strengthen unity by reinforcing linguistic minorities throughout Canada, particularly French-speaking minorities. According to David Milne, the Act was intended to ensure "the right of French Canadians to feel symbolically and officially a part of the whole country and to enjoy rights to government services...in all provinces of Canada."[34] Trudeau and his partisans felt that if the federal government could make Canada more hospitable to, and could provide more opportunities for, French-speaking Canadians, Quebecers would be less inclined to turn to their provincial government to advance their interests and would be less likely to support the disengagement or separation of Québec from Canada.

Finally, it was hoped that official bilingualism would result in increased communication between Canadians who would no longer be subject to such strict linguistic barriers. This, it was hoped, would further understanding and common interests among Canadians which would lead to greater national integration.[35]

There were two main pillars to the official bilingualism policy through which these national unity objectives were to be achieved. The first related to integrating French and French Canadians into federal institutions,[36] while the second related to strengthening official language minority communities. For our purposes here, the latter is more important. With this pillar, Ottawa's primary intention was to undermine the claims of the Québec government that it alone was the *national* government of French-speaking Canadians. Ottawa sought to do this by aiding the anglophone community within Québec and, more importantly, by strengthening French-speaking communities outside that province.[37] According to Kenneth McRoberts: "Strengthening the Francophone presence outside of Québec was central to [Trudeau's] whole strategy for combating Quebec nationalism and separatism."[38] The rationale for this objective was that if all of Canada is home to the French Canadian nation[39] and Québec is home to a large and viable English-speaking population, the Québec government's claim to represent French Canada becomes illegitimate and Ottawa becomes the sole governmental representative of Canadians of both languages.[40] With the strategic and symbolic importance of official language minority communities, these communities gained a great deal more support from the federal government and a much higher national profile and level of influence than they had previously enjoyed (this applies most to francophone minorities as the Québec anglophone minority had always been powerful economically).[41]

To fulfill the commitment to this aspect of the bilingualism strategy, Ottawa has provided millions of dollars in funding directly to official language minority groups through the departments of Secretary of State and now Canadian Heritage, in order for these groups to have the financial resources necessary to remain healthy, viable communities.[42] Ottawa has also transferred many millions more to the provinces for them to fund minority language education and immersion programmes.[43] Finally, Ottawa committed in the Official Languages Act to provide services in both French and English in order that official language minority communities could receive federal government

services without abandoning their language.[44] The maintenance of strong, healthy official language minority communities was one of the most important tenets of the bilingualism strategy for national unity and, we will see, was one of the key purposes underlying many language rights.

The federal government has adopted a number of other strategies to supplement these two fundamental pillars of official bilingualism. One such strategy was to increase funding to the main national French-language cultural agency, the *Société Radio-Canada* (the French language branch of the CBC).[45] Another strategy involved the extension of bilingualism into all areas of federal jurisdiction. Canadians have found that many consumer products (such as food labels), air travel, postal services and a number of other aspects of daily life have become increasingly bilingual as a result of Ottawa's initiatives.[46] Another strategy which is important for our purposes here has seen Ottawa transfer more money to the provinces in order to provide services other than education in the minority official language. Ottawa has provided money for such minority language services as health care, social services, legal services, media and small business development.[47] All of these strategies are oriented toward strengthening official bilingualism and national unity.

In many ways, these aims of the Official Languages Act and the (re)establishment of a bilingual, dualistic Canada bear the influence of Henri Bourassa.[48] Founder of Montréal's Le Devoir newspaper, Bourassa was one of French Canada's most outspoken and passionate defenders in the late nineteenth and early twentieth centuries. Long before the Royal Commission on Bilingualism and Biculturalism and long before Trudeau, Bourassa had called for a bilingual country in which French and English Canada would extend from coast to coast and in which the French and English languages would be equal. More than 50 years prior to the passage of the Official Languages Act, Bourassa had called for "equality throughout the length and breadth of this confederation,"[49] and advocated a recognition of the official status of French and English: "If the two languages are official…these languages have the right to co-exist wherever the Canadian people has its public life."[50] Much like the modern architects of the official bilingualism policy, Bourassa sought equality and increased status for francophone minorities in the English provinces: "if the Canadian Confederation is to be maintained,

the narrow-mindedness towards minorities which manifests itself more and more in the English provinces must disappear, and there must be a return to the initial spirit of the alliance."[51] Bourassa was also, in many ways, the father of a pan-Canadian francophone nationalism which Trudeau later sought to harness and strengthen as part of his bilingualism strategy.[52] Speaking with the approval of many French Canadians, Bourassa declared: "Our nationalism is a Canadian nationalism founded on the duality of races and on the particular traditions which accompany this duality. We are working for the development of a Canadian patriotism, which in our eyes is the best guarantee of the existence of the two races and of the mutual respect they owe one another."[53] Stating simply his vision for the future, Bourassa said: "Canada is and must remain...an Anglo-French country."[54]

Although Bourassa's vision may have been before its time, as his calls often fell on deaf ears while linguistic tensions escalated during his life, his vision would eventually be implemented in legislation after his death. Bourassa's stamp on the contemporary Canadian language regime was realized in large part due to his enormous influence on a number of prominent French Canadian federalist leaders of the 1960s and 1970s.[55] These ideological descendents of Bourassa included the co-Chair of the Royal Commission on Bilingualism and Biculturalism, André Laurendeau (whom McRoberts describes as "in many respects, Bourassa's spiritual heir"[56]), Pelletier, Marchand and, most importantly, Trudeau.[57] Trudeau's vision, which Milne describes as a "Quebec-based theory of the country,"[58] and which sought to entrench bilingualism in the constitution, owes much to the writing of Henri Bourassa and as a national unity strategy, appealed directly back to a Canadian nationalist movement that originated with Bourassa in Québec. As such, the impact of Bourassa's vision on the current national unity debate is significant.

Since the initial passage of the Official Languages Act, the Trudeau government and its successors have been relatively successful in achieving support for the strategy of official bilingualism. Within the House of Commons, there has been nearly all-party consensus in favour of bilingualism since the inception of the policy.[59] The only major Canadian party to oppose the policy was the Reform Party in the late 1980s and early 1990s[60] (however, Reform did support a different form of bilingualism for Canada[61] and since the party has been re-crafted into the Canadian Alliance and more recently, the

Conservative Party of Canada, it now officially supports the current bilingualism policy[62]). Similarly, opinion polls indicate strong support among the Canadian electorate for bilingualism. A 1988 survey, conducted the year the Official Languages Act was updated, found that sixty-seven percent of Canadians support official bilingualism.[63] More recently, a 2002 survey found that eighty-two percent of Canadians, including an impressive ninety-one percent of 18-24 year-olds, support the policy of official bilingualism.[64] Such support validates Milne's conclusion that: "bilingualism is widely recognized as part of the new political landscape of Canadian life."[65] Among political elites, this support for official bilingualism appears to be extremely solid, such that Canadian elites "can be expected to defend it against unilingual backlashes."[66] Gibbins goes as far as to suggest that there is a deliberate, consociational effort by elites to exclude open debate on bilingualism, so entrenched is the policy in the Canadian political mindset.[67] These facts indicate that the potential of official bilingualism to unite Canadians politically is clearly an achievable goal.

While the policy of official bilingualism became relatively popular at the federal level, it was clear to Trudeau that activity within the provinces would be important to the realization of the objectives underlying the policy. To advance bilingualism to the extent that it was felt it would be most beneficial required the provincial governments (over which Ottawa has no jurisdictional power) to adopt a degree of bilingualism, as it is these governments that are often responsible for many of the services that affect citizens most directly and are thus most crucial to the survival of minority communities.[68] Trudeau needed the provinces to foster and encourage the institutions through which genuine cultural preservation is best assured, institutions such as educational facilities, municipalities and legal services. In their commitment to national unity, some provinces took steps in this direction, often adopting policies (and in some cases language rights) oriented toward achieving the equality of French and English and the maintenance of the linguistic minority community in the province.

Examples of the extension of official bilingualism into provincial jurisdiction vary a great deal across the provinces. For example, New Brunswick declared itself to be officially bilingual the same year as did the federal government and offers extensive services in both official languages.[69] Likewise, Québec has offered very wide-ranging

services to its anglophone community for decades.[70] Ontario offers a number of bilingual services such as legislative bilingualism, an extensive French education system, French language legal services and a publicly funded French language television station.[71] However, the advances in Ontario have taken place gradually over many years and, in spite of its having the largest francophone minority in Canada, Ontario refuses to recognize itself as officially bilingual.[72] Nonetheless, the services and rights enjoyed by Franco-Ontarians are significant. Even outside this "Bilingual Belt,"[73] linguistic minority communities often enjoy certain rights and services (although these tend to be less extensive as the commitment to bilingualism of the governments of these provinces tends to be more lukewarm). Therefore, with the opting-in of many provinces to the bilingualism regime to some degree, the national unity strategy of official bilingualism is, in many ways, also relevant to the provinces thereby making it a truly national strategy, rather than simply a policy project of the federal government.

However, seeking both to strengthen official bilingualism in Canada by constitutionally entrenching it and to negotiate greater (and more consistent) provincial commitment to it, Trudeau sought to amend the constitution to include additional language rights provisions. Constitutional amendment, it will be recalled, was an option Trudeau had advocated before even entering federal politics.[74] The long process of constitutional negotiation initiated by Trudeau resulted in the proclamation of the *Constitution Act, 1982* and the considerable strengthening of the official bilingualism regime in Canada, particularly in provincial jurisdiction.

Language Rights

As noted above, Trudeau had long favoured the patriation of Canada's constitution and the entrenchment of a bill of rights which would include an expansion of the scope of bilingualism (hopefully into provincial jurisdiction to a greater degree).[75] Indeed, the entrenchment of bilingualism in the constitution through language rights in a general bill of rights was one of Trudeau's highest priorities.[76] As Michael Mandel explains: "tucked away somewhere in the general Bill of Rights would be the key to the whole enterprise: entrenched minority language rights."[77] Trudeau initiated a number of failed or stalled attempts at entrenching bilingualism into the constitution over a period of several years after he became Prime Minister. With the election of the PQ in 1976, Trudeau became

even more committed to the entrenchment of bilingualism to ensure national unity. During the campaign on the PQ's sovereignty referendum of 1980, Trudeau promised Quebecers constitutional change if they voted to keep Canada united.[78] When Quebecers defeated the sovereignty motion by a margin of roughly sixty percent, Trudeau seized the opportunity and initiated a new round of constitutional discussions, discussions which eventually led to the amendment of Canada's constitution. The new constitution was patriated from the United Kingdom with a series of amendments including the *Canadian Charter of Rights and Freedoms* (the *Charter*) which entrenched official bilingualism into Canada's supreme law. The process that led to the *Constitution Act, 1982* was extremely controversial and the final agreement on the constitutional package has never been formally endorsed by the Québec National Assembly.[79] However, the constitution applies to Québec in its entirety, including the new *Charter*.

While the *Charter* has 'revolutionized'[80] Canadian political life in a number of ways, among the most significant relate to its inclusion of a series of language rights. Sections 16 through 23 of the *Charter* contain a number of language rights which have been entrenched in Canada's pre-eminent rights document. Section 16 establishes French and English as the official languages of Canada and New Brunswick and establishes that the *Charter* does not limit the authority of the legislatures to advance linguistic equality. Sections 17 through 19 mandate legislative and judicial bilingualism for Canada and New Brunswick (to the extent that these provisions apply to the former, they are simply a reaffirmation and simplification of the rights guaranteed in s. 133 of the *Constitution Act, 1867*[81]). Section 20 mandates that government services offered by Canada and New Brunswick must be available to the public in either official language.[82] In addition, the *Charter* contains education rights for official language minorities in s. 23 which will not be explored in detail in this analysis. The inclusion of all of these bilingualizing rights in the *Charter* represents the achievement of Trudeau's goal to entrench bilingualism in the constitution. The inclusion of those rights which apply to the provinces (the education rights of s. 23 and the rights applicable to New Brunswick of ss. 16 through 20) was a particularly important victory for Trudeau as it extended bilingualism into provincial jurisdiction to an extent that had not previously been seen.[83] While many of the rights that we will be dealing with in this study are not *Charter* rights, the entrenchment of

official bilingualism into the *Charter* reinforced the importance of all language rights as a nation building tool (both those of the *Charter* and others) and gave critical new momentum to the official bilingualism regime.

With the entrenchment of the *Charter*, Canada's language rights regime has been reinforced significantly. Linguistic minorities in Canada now enjoy the bilingualizing provisions of s. 133 of the *Constitution Act, 1867*, which apply to Québec and Canada, s. 23 of the *Manitoba Act, 1870* which, although long in disuse, has recently been revitalized by the judiciary (see the following chapter) and ss. 16-22 of the *Charter*, which include a number of linguistic guarantees for the federal government and New Brunswick. In addition, official language minorities enjoy a number of education rights, statutory rights and other provisions exclusive to certain provinces. While these minorities continue to face grave challenges, with the *Charter*, they now enjoy much greater constitutional/legal protection in Canada than ever before.

Nearly all of the language rights recognized in Canada, including the rights reaffirmed and entrenched in the *Charter*, serve to advance Canada's policy of official bilingualism. Indeed, many of the rights protected in the *Charter* are also contained in the Official Languages Act which demonstrates that these language rights are simply the constitutional manifestation of an earlier federal policy decision.[84] The language rights contained in the *Charter* represent the entrenchment of the policy of bilingualism and are oriented primarily toward strengthening national unity.[85] Similar non-entrenched language rights (such as those passed by statute in the provinces) are also established pursuant to the policy of bilingualism and are equally oriented toward the maintenance and strengthening of national unity. While language rights are not necessarily any less important or fundamental than the other rights recognized in the *Charter* (such as the right to free speech, or legal equality),[86] unlike fundamental rights, the importance given to language rights as part of bilingualism is due to nation-building.

The ways in which it has been felt that entrenched language rights would strengthen bilingualism and national unity are numerous. Perhaps the most important way is that doing so has added a degree of permanence and increased status to the policy of bilingualism which seeks to guarantee the equality of French and English in Canada. As Knopff and Morton describe: "entrenching the polic[y] of bilingualism...in the Charter of

Rights and Freedoms was clearly intended to enhance [its] symbolic status as [a] central attribute…of Canadian citizenship and [as a] component…of Canadian identity, and thus to improve [its] nation building potential."[87] As the experiences of the 1970s, 1980s and 1990s indicate, constitutional amendments related to language issues are extremely difficult to achieve in Canada, with the result being that it would be difficult for any government to weaken the constitutional language rights regime that now exists in Canada. Even those non-entrenched language rights which are not found in the constitution have a degree of permanency as they are now closely associated with the '*Charter* values' with which most politicians and political parties are loathe to interfere. Therefore, when faced with (provincial) governments or majorities that are indifferent or even hostile to their plight, these minorities now have a number of rights oriented toward their cultural and linguistic survival which cannot easily be taken away. The language rights thus serve as a relatively permanent tool to prevent the assimilation of linguistic minorities, an objective which has been such an important pillar of the federal strategy to make all of Canada home to both linguistic groups.[88]

Another way in which language rights have potential to strengthen the policy of bilingualism and contribute to national unity is through their symbolic value. Beyond the legal effects of protecting the rights of Canadians from unreasonable governmental limitations, the *Charter* and the rights therein were also intended to serve a symbolic purpose by creating a new national citizenship.[89] Trudeau and his partisans hoped that the *Charter* would unite Canadians and cause them to identify with the nationally applicable rights in it and the spirit of freedom and liberty underlying it. The rights in the *Charter* were to represent attributes of Canadian citizenship and were to be a common unifying thread around which all Canadians could unite regardless of province, region and especially language. In many ways, the language rights provisions of the *Charter* were to serve an important role in this function as they guarantee that French and English are equal across Canada. The bilingual character of Canada was thus to become a fundamental and entrenched tenet of Canadian citizenship, a tenet which is reinforced with other, non-entrenched, language rights. It was hoped that the recognition of the equality of French and English in statute and in the constitution would make Canadians, particularly French Canadians, feel that they are part of a national linguistic group and

that their loyalties should lie not with a particular province, but with the larger Canadian nation. Bilingualism and *Charter* advocates hoped that these rights would help engender a national identity which would increase attachment to a unified Canada while mitigating regional and linguistic differences.[90]

Another way in which language rights were intended to reinforce national unity is through the judiciary.[91] While the language rights contained in the *Constitution Act, 1867*, the *Manitoba Act, 1870* and in statute have always been subject to judicial scrutiny, with the *Constitution Act, 1982*, the courts have been entrusted with the power of judicial review for constitutional consistency.[92] Through s. 52 of the new *Act*, the courts are now explicitly empowered to strike down any law that is inconsistent with the constitution, which is said to be 'the supreme law of Canada.' In addition, through s. 24(1) of the *Charter*, the courts are now entitled to provide remedies to any litigant who feels that their *Charter* rights have been unreasonably limited (among language rights, only those contained in the *Charter*, are eligible for s. 24 remedies. Other language rights not found in the *Charter* are not subject to the same remedy clause). With the heightened role for the judiciary in interpreting language rights, it has become a much more important player in the national unity game. This increased role for the judiciary in interpreting language rights is a new development in Canadian politics.[93]

This new role for the courts in language rights interpretation is important for a number of reasons. For example, the judges of most of the important courts in Canada that would be called upon to interpret language rights (including the judges of the Supreme Court, the federal courts, the provincial appellate courts and some provincial trial courts) are all appointed by the federal government. This appointment power is an important prerogative of the federal government. Peter Russell writes of a "dimension of political power in [this] political control of judicial appointments [which] is the opportunity [it] gives the governing party in Ottawa to influence the political orientation of judicial power in Canada."[94] Through its ability to appoint judges whom it considers to be ideologically suitable and who would likely resolve disputes in a manner it favours, the federal government possesses an important political resource to affect public policies such as official bilingualism. James G. Snell and Frederick Vaughan suggest that since the period immediately following confederation, political leaders have seen "the courts as

one of a variety of institutions through which political plans for the nation might be achieved."[95] Dispelling the myth that judges are impartial arbitrators whose ideological leanings and political beliefs will not be commensurate with those who appointed them, Russell warns that Canadians "should not expect men and women to [be appointed to the courts who are] empty vessels devoid of strong positions on the major philosophical and jurisprudential issues."[96] He worries that "the Prime Minister and cabinet [have an opportunity to] load up the Court[s] with their political cronies or their ideological soul-mates."[97] While the abuse of this power for purposes of political patronage has generally been of greater concern for critics,[98] there is no question that the judicial appointment power also gives Ottawa a considerable ability to influence public policy.[99]

This appointment power can be used by the federal government to affect the development of bilingualism by appointing justices whose views on language rights and bilingualism are known to be sympathetic to the federal position and whose interpretation of these rights is likely to be favourable. The appointment of such sympathetic judges, bilingualism advocates hoped, would likely result in liberal language rights interpretation which would strengthen the unifying effects of the rights. The federal power to appoint bilingualism-friendly judges has potential to be a critical element of the language rights strategy.

In addition, Canada's judicial system is a unified system with a national institution, the Supreme Court, sitting at the apex of judicial power.[100] The decisions of the Supreme Court are binding on all governments and courts in Canada which means that when it rules on language issues, its decisions bind all lower courts and all governments.[101] As such, the Court's rulings are unified, centralized decisions which apply equally across Canada. Therefore, if the Court interpreted the language rights in the constitution generously in a given case (as language rights advocates hoped would transpire), that precedent would apply equally across Canada, which would mean that each jurisdiction would be obligated to implement the generous interpretation provided by the Court. Therefore, it was also hoped that with the new power of judicial review and the new precedence given to bilingualism in the *Charter*, the Supreme Court would become more active in establishing homogenizing decisions on language rights issues which would lead to greater commonalities among Canadians across the country.

This new role for the judiciary in safeguarding and advancing language rights was clearly in the minds of the federal sponsors of the *Charter*, as is evidenced by their exclusion of language rights from the constitutional override. In order to secure the provinces' consent to the *Charter* package in the negotiating process, federal authorities had to concede to allowing laws to be made in certain cases, by either provincial or federal governments, notwithstanding *Charter* provisions. However, the federal negotiators would not permit the 'notwithstanding clause,' s. 33 of the *Charter*, to apply to its prized language rights.[102] While Trudeau was willing to allow many of the more 'fundamental' rights protected in the *Charter* to be overridden (such as the freedoms of expression, equality and *habeas corpus*),[103] he was not willing to allow the central plank of his national unity strategy and the *sine qua non* of his *Charter* project[104] to be compromised by s. 33.[105] Indeed, language rights, along with official language minority education rights and mobility rights (as well as democratic rights) were "the only non-negotiables for Trudeau"[106] and are the only substantive *Charter* rights exempted from s. 33. This exemption proves the considerable importance of language rights to the Trudeau government and its intentions to secure national unity through the *Charter*.[107] As Russell describes: "For the Liberal government these sections were the heart of the *Charter*."[108] Therefore, language rights and the role of the federally appointed judiciary in interpreting them were crucial to the Trudeau government's aspirations to secure national unity.

The importance of the new role for the federally appointed judiciary in the interpretation of language rights is underscored by the measures adopted by Ottawa to assist official language minorities in bringing their rights claims before the courts. With the election of the PQ in 1976 and the passage, the following year, of Bill 101 (The Charter of the French Language) which presented the possibility of a court challenge under s. 133, the federal government created the Court Challenges Programme (CCP) in 1977[109] (then Prime Minister Trudeau may also have been confident that new language rights would soon be entrenched in a bill of rights). This programme was created to provide financial assistance to official language minorities in Québec and English Canada who were bringing lawsuits for violations of language rights (generally under s. 133 and s. 23 of the *Manitoba Act, 1870*) against provincial governments. The impact of this programme on the litigation of language rights has been significant.

The federal strategy in establishing the CCP is to assist official language minority interest groups in taking legal claims to the courts (particularly to the Supreme Court) in hopes that the courts will establish favourable language rights precedents. Such action is intended to allow the federal government to indirectly influence provincial policy regimes (through the courts' language rights precedents) and to assist in the establishment by the judiciary of national policies which are favourable to official language minorities, the policy of bilingualism and national unity.[110] As Knopff and Morton describe, for official language minorities that are "politically weak at the provincial level but with support in Ottawa...[funding from the CCP allows them] to use the courts to do an end run around unsympathetic provincial governments."[111] They add: "While these [official language minorities] are typically presented as private-sector non-governmental organizations...or citizens' groups, their dependence on federal funding has made them a *de facto* instrument of Ottawa's national unity policy."[112] While this may be a somewhat cynical and exaggerated assessment of the collusion between official language minority groups and the federal government,[113] the authors' point that the federal government's funding of language rights litigation through the CCP is oriented toward the advancement of bilingualism and national unity is sound.

As well, the federal government (in addition to other governments sympathetic to the policy of bilingualism, such as New Brunswick and Ontario[114]) often intervenes in language rights disputes not directly affecting it, as does the federal Commissioner of Official Languages, the federally appointed public servant empowered to observe and report on developments related to official bilingualism.[115] It is therefore not uncommon to have taxpayers funding three or more governmental, para-governmental and non-governmental interveners and litigants in a single language rights case, so important are such cases deemed to be to official bilingualism and national unity. Ottawa's funding of, and participation in, court challenges against provincial governments is another important way in which the federal government seeks to use language rights to strengthen official bilingualism and national unity in Canada.

Conclusion

As we have seen in this chapter, official bilingualism and the language rights which comprise such an important element of it have been viewed as a means of securing

national unity by successive federal governments. In this study, we are interested in determining whether this outlook has been adopted and reflected in the jurisprudence of the judiciary. As we have discussed, the judiciary's role in the realization of this national unity strategy is critical as the courts have the potential to have a substantial impact on the bilingualism regime. Because the Supreme Court decides only a fraction of language rights cases that arise, the courts of the provinces are cast into a critical role in the development of the bilingualism scheme. Accordingly, we will focus our examination on the language rights jurisprudence of the provincial courts. Doing so is important not only because it will provide us with information about the development of language rights as a national unity strategy in recent years (in our four sub-fields), but it will also allow us to gain a greater understanding of the role of provincial courts in public policy issues and the way in which lower courts follow precedent. In order to gain this important knowledge, the precedents and interpretive approaches of the Supreme Court which the provincial courts are to follow must first be explored.

NOTES

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[1] For a more thorough account of the history of language politics in Canada, see Kenneth McRoberts. Misconceiving Canada: The Struggle for National Unity. (Toronto: Oxford University Press, 1997). This source also serves as a critique of the bilingualism regime discussed in this chapter.

[2] It should be noted that it is the judiciary's interpretation of the language rights which have *potential* to strengthen national unity that is the key point in which we are interested. Therefore, we will be testing only whether the judicial treatment of these rights is commensurate with the vision of the architects of this unity strategy, rather than the success of the strategy itself. Empirical issues such as whether language rights and bilingualism create feelings of greater patriotism or warmth to the regime will not be tested in this analysis.

[3] R. v. Beaulac, [1999] 1 S.C.R. 768.

[4] Ibid., para. 25.

[5] Ibid.

[6] Mike Ponting. "Francophone Minority Identities and Language Rights in Canada." Federal Governance, A Graduate Journal of Theory and Politics. (Vol. 1, no. 3 [2004]). Available at: http://cnfs.queensu.ca/federalgovernance/index.html

[7] A we will see in chapter four, the Court has issued a minor ruling on a language rights issue in the case of R. v. Peters; R. v. Rendon, [2001] 1 S.C.R. 997. However, in my mind, this ruling was a relatively minor decision and not a significant language rights precedent which affected the Court's approach to language issues. Indeed, as we will see in later chapters, the Court has consistently avoided having to revisit language rights issues by denying leave to appeal to a number of language rights litigants appealing from provincial courts.

[8] Denise G. Réaume. "The Demise of the Political Compromise Doctrine: Have Official Language Use Rights Been Restored?" McGill Law Journal. (Vol. 47 (May 2002) 593-624), 618.

[9] While the phrase 'language rights' encompasses a wide variety of statutory and constitutional language provisions, including those not studied in this examination, for purposes of simplicity, in most cases in this examination, 'language rights' will refer only to the four sub-fields at which we will be looking.

[10] There have, of course, been Aboriginal groups in Canadian territory since long before the arrival of either then English or French colonists. Unfortunately, however, these indigenous peoples were not treated as founding peoples until very recently (to the extent that they are now) and, with the exception of the violent

uprisings in the North West Territory in 1869 and 1885, were not generally given a prominent role in the linguistic debates that were taking place in mainstream Canadian politics at the time.

[11] Law-makers have also, on some occasions, made attempts to prevent the co-existence of both groups by trying to assimilate the French-speaking group into the English.

[12] Richard Simeon and Ian Robinson. State, Society, and the Development of Canadian Federalism. (Royal Commission on the Economic Union and Development Prospects for Canada, Vol. 71. Toronto: University of Toronto Press, 1990), 187.

[13] Similar provisions applying to Manitoba were added to the constitution in the form of s. 23 of the *Manitoba Act, 1870* when that province was admitted into confederation.

[14] David Milne. Tug of War: Ottawa and the Provinces Under Trudeau and Mulroney. (Toronto: James Lorimer and Company, Publishers, 1986), 53.

[15] In the early years following confederation, language and religion were largely coterminous with French speakers being Roman Catholics and English-speakers generally being Protestants (the main exception was the Irish-Canadian community, which was English-speaking yet Catholic). For example, writing of New Brunswick in that era, Ralph Heintzman indicates "where separate schools existed French language education was assured, for the two went hand in hand." Ralph Heintzman. "The Spirit of Confederation: Professor Creighton, Biculturalism, and the Use of History." The Canadian Historical Review. (Vol. 52, no. 3 [September, 1971]), 249. Similarly, Heintzman indicates, at 260, that before Manitoba's entry into confederation, its "two linguistic communities…corresponded to the denominational divisions of the colony." Accordingly, conflicts related to religion typically had linguistic implications. In many ways, however, language and religion were simply elements of the larger French Canadian and British Canadian cultures of the time and many cultural disputes simply took the form of religious or linguistic conflicts. For example, the link between the French language and the larger French Canadian culture is clearly seen in Edmund A. Aunger. "Justifying the End of Official Bilingualism: Canada's North-West Assembly and the Dual-Language Question, 1889-1892." Canadian Journal of Political Science. (Vol. 34 [September, 2000]), 451-486. There, the author describes not only how a number of Northwest Territorial legislators adopted the rallying cry: "one language and one nationality," but a number of other ways in which the French language was associated with the French Canadian identity as well.

[16] Roger Gibbins. Conflict & Unity: An Introduction to Canadian Political Life. Third Edition. (Scarborough, Ontario: Nelson Canada, 1996), 108.

[17] See Kenneth Munro. "Official Bilingualism in Alberta." Prairie Forum. (Vol. 12, no. 1 [Spring 1987]), 37-47. See also Heintzman and Aunger.

[18] Among the strategies that have been employed by one or more federal governments since the 1960s which are not described in detail here are: the redesigning of many national symbols to better reflect Québec's presence within Canada and to diminish the British influence in Canadian symbols (Simeon and Robinson, 188, Gibbins 114, 116), making economic arguments against the secession option, spending initiatives in Québec aimed to convince Quebecers of the important role played by the federal government in the province and alterations in Ottawa's approach to federal-provincial relations (for example, in the 1960s, the Pearson government adopted of a form of accommodative, asymmetrical federalism [Simeon and Robinson, 188], while in the 1980s, the Mulroney government sought a more decentralized federation with some federal power devolved to the provinces).

[19] Canada. Report of the Royal Commission on Bilingualism and Biculturalism. General Introduction. Book I: The Official Languages. (Ottawa: Queen's Printer, 1967), 86. See also 91.

[20] Pierre Elliott Trudeau. "Quebec and the Constitutional Problem." In Federalism and the French Canadians. (Toronto: The Macmillan Company of Canada Limited, 1968), 18.

[21] Ibid., 29.

[22] Ibid., 3.

[23] Ibid., 47.

[24] Pierre Elliott Trudeau. "A Constitutional Declaration of Rights." In Federalism and the French Canadians. (Toronto: The Macmillan Company of Canada Limited, 1968) 55.

[25] Ibid., 56.

[26] Trudeau. "Quebec and the Constitutional Problem," 6.

[27] Ibid., 44-5.

[28] Ibid., 48.

[29] Trudeau. "A Constitutional Declaration of Rights," 56. See also 54.

[30] F.L. Morton and Rainer Knopff. The Charter Revolution and the Court Party. (Peterborough, Ontario: Broadview Press, 2000), 77.
[31] Kenneth McRoberts. "Making Canada Bilingual: Illusions and Delusions in Federal Language Policy," in David P. Sugarman and Reg Whitaker (eds.). Federalism and Political Community: Essays in Honour of Donald Smiley. (Peterborough, Ontario: Broadview Press, 1989), 146.
[32] However, there are other purposes underlying the Act. For example, the adoption of official bilingualism has created a number of new jobs in Canada, particularly within the federal government. As well, a recent federal policy statement (Canada. Privy Council Office. The Next Act: New Momentum for Canada's Linguistic Duality: The Action Plan for Official Languages. Ottawa: Privy Council Office, 2003, 1) suggests that the promotion of Canada's two official languages is beneficial in its own right, as these languages are an important part of Canada's heritage. Perhaps most importantly, official bilingualism is now seen by the federal government to provide Canada with a "competitive edge" in an environment of globalization, which can enhance Canadians' mobility and access to international markets and employment (Privy Council Office, 2).
[33] Knopff and Morton (2000), 69.
[34] Milne, 27.
[35] McRoberts (1997), 107-8. The Official Languages Act was updated by the Mulroney Government in 1988 with a number of minor amendments, the general objectives and rationale of the law remaining the same.
[36] In pursuit of this objective, the federal government has undertaken efforts to bilingualize the federal public service (which included spending a great deal of money on language training programs for unilingual public servants and appointing a number of francophones to senior public service positions). This was done in order to grant status to French in the Canadian government and to provide employment opportunities to francophones. This, it was hoped, would suggest to Quebecers that the federal government was committed to integrating them into federal institutions and to strengthening the national stature of the French language. This would result, federal officials hoped, in Quebecers fulfilling their ambitions in the wider, pan-Canadian community. As well, Ottawa hoped to counter-act the perception among Quebecers that only the Québec government offered career opportunities and mobility for young, motivated, educated francophones. See McRoberts (1989) 147, Peter H. Russell. "The Political Purposes of the Canadian Charter of Rights and Freedoms." The Canadian Bar Review. (Vol. 61 [1983]), 38, Milne, 186, and Gibbins 115.
[37] Rainer Knopff and F. L. Morton. "Nation-Building and the Canadian Charter of Rights and Freedoms," in Alan Cairns and Cynthia Williams. Constitutionalism, Citizenship and Society in Canada. (Royal Commission on the Economic Union and Development Prospects for Canada, Vol. 33. Toronto: University of Toronto Press, 1985), 143.
[38] McRoberts (1989), 147.
[39] McRoberts (1997), 85.
[40] Simeon and Robinson, 189.
[41] McRoberts (1989), 145 and 162.
[42] Knopff and Morton (2000), 89 and 93.
[43] McRoberts (1989), 148.
[44] Gibbins, 114.
[45] McRoberts (1989), 148.
[46] Gibbins, 114.
[47] McRoberts (1997), 98.
[48] Ibid., 118.
[49] Henri Bourassa. *Pour La Justice*, Montréal, 1912. (in Joseph Levitt. Henri Bourassa on Imperialism and Bi-culturalism, 1900-1918. Toronto: The Copp Clark Publishing Company, 1970, at 132).
[50] Ibid., 135.
[51] Ibid., 132.
[52] Milne, 52.
[53] Henri Bourassa. "Résponse amicale à la Vérité." *Le Nationaliste*, April 3, 1904. (in Levitt at 107).
[54] Henri Bourassa. *Le 5e Anniversaire du Devoir*, 1916. (in Levitt, at 159).
[55] Milne, 53.
[56] McRoberts (1997), 118.

[57] Milne, 51.
[58] Ibid., 55.
[59] Richard J. Joy. Canada's Official Languages: The Progress of Bilingualism. (Toronto: University of Toronto Press, 1992), 7.
[60] Gibbins, 120.
[61] Ibid.
[62] Although some doubts were raised about the party's long-term commitment to bilingualism during the 2004 federal election campaign, when the party's language critic, Scott Reid made comments suggesting that a Conservative government would "restrict the provision of bilingual services." Sean Gordon. "Language Puts Harper Pal's Foot in Mouth: Concerns Raised About Curbs on Bilingualism. The Vancouver Sun. May 28, 2004, A6.
[63] Gibbins., 118.
[64] Privy Council Office. 3. A survey conducted for the Centre for Research and Information on Canada in December 2003 found similarly high support for bilingualism in Canada. See Andrew Parkin and André Turcotte. "Bilingualism: Part of Our Past or Part of Our Future." (The CRIC Papers. No. 13. Centre for Research and Information on Canada, March, 2004. See http://www.cric.ca/pdf/cahiers/cricpapers_march2004.pdf) Interestingly, many English Canadians strongly link bilingualism to Canadian unity. 65 percent of Anglophones outside Québec responded affirmatively to the question "Learning to speak French is an important way in which Canadians can help to keep the country united."
[65] Milne, 65.
[66] Ibid.
[67] Gibbins, 119.
[68] McRoberts (1997), 94.
[69] Ibid., 95.
[70] C. Michael MacMillan. The Practice of Language Rights in Canada. (Toronto: University of Toronto Press, 1998), 128. However, while Québec was officially bilingual at the time of the passage of the Official Languages Act, with the passage of Bill 101, the province became officially unilingual, thereby taking steps away from increased bilingualism.
[71] McRoberts (1997), 95.
[72] To Constitutional law scholar Peter Russell, this has undermined the entire national unity project and the securing of official bilingualism. He suggests: "Any symbolic gains for national unity that may flow from [bilingualism and the Official Languages Act] are largely offset by the persistence of the government of Ontario, the province with the largest Francophone minority, in refusing to give constitutional status to bilingualism in the public life of the province." Russell (1983), 39.
[73] Joy, 9.
[74] Trudeau. "A Constitutional Declaration of Rights," 57.
[75] Michael Mandel. The Charter of Rights and the Legalization of Politics in Canada. (Revised, Updated and Expanded Edition. Toronto: Thompson Educational Publishing Inc., 1994), 20.
[76] Russell (1983), 33.
[77] Mandel, 21.
[78] Russell (1983), 39.
[79] For a detailed description of the events of the early 1980s that led to the patriation of the constitution, see Peter H. Russell. Constitutional Odyssey: Can Canadians Become a Sovereign People? Second Edition. (Toronto: University of Toronto Press, 1993), 107-126.
[80] See Knopff and Morton (2000).
[81] Similarly, some of the other *Charter* rights applicable to the federal government are simply the constitutional entrenchment of rights guaranteed under the Official Languages Act, such as the right to receive services from the federal government in either official language. With this entrenchment, the rights provided by the Act are no longer subject to legislative repeal and can only be eliminated through constitutional amendment. This provides significantly more protection for official language minorities as their rights are no longer at the mercy of Parliamentary majorities.
[82] However, for Canadian government services, this provision is subject to certain limitations based on demand and the nature of the service (all *Charter* rights are subject to s. 1 'reasonable limitations').

Sections 21 and 22 of the *Charter* simply provide that the previous language rights do not disturb established language rights for official or non-official languages.

[83] Recall how important the ability to "learn" either official language in every province in Canada was to Trudeau in his pre-Prime Minister writings (Trudeau. "A Constitutional Declaration of Rights." 56).

[84] Russell (1983), 39.

[85] Jonathan L. Black-Branch. "Constitutional Adjudication in Canada: Purposive or Political." Statute Law Review. (Vol. 21 (2000), No. 3), 182.

[86] Gordon Scott Campbell. "Language, Equality and the Charter: Collective vs. Individual Rights in Canada and Beyond." National Journal of Constitutional Law. Vol. 4 (1994), 36.

[87] Knopff and Morton (1985), 144.

[88] Russell (1983), 38.

[89] Ibid., 36.

[90] Knopff and Morton (1985), 144.

[91] Milne, 52.

[92] Russell (1983), 40.

[93] Milne, 55.

[94] Peter Russell. The Judiciary in Canada: The Third Branch of Government. (Toronto: McGraw-Hill Ryerson Limited, 1987), 116.

[95] James G. Snell and Frederick Vaughan. The Supreme Court of Canada: History of the Institution. (Toronto: University of Toronto Press, 1985), 47-48.

[96] Peter Russell. "Meech Lake and the Supreme Court," in Katherine E. Swinton and Carol J. Rogerson. Competing Constitutional Visions: The Meech Lake Accord. (Toronto: The Carswell Co. Ltd., 1988), 105.

[97] Ibid.

[98] For example, see Russell (1987), 114-116.

[99] The immense importance of the power to appoint judges was proven in the Meech Lake Accord in which the provinces sought and achieved a role in the nomination and appointment of Supreme Court justices. Similarly, the dispute that arose in the early 1980s between the Saskatchewan Conservatives and the federal Liberals, in which the government of Saskatchewan refused to allow Ottawa to fill the seats on the provincial Court of Appeal (because Ottawa tended to appoint provincial Liberals) also testifies to the immense ideological importance of the Ottawa's judicial appointment power (Russell (1987), 112). The political nature of such appointments is well understood in the United States (Americans were made aware of the political and ideological importance of the President's Supreme Court appointment power during the Robert Bork nomination hearings).

[100] Knopff and Morton (2000), 62.

[101] Russell (1983), 41.

[102] Knopff and Morton (2000), 60.

[103] Mandel, 34.

[104] Simeon and Robinson, 259.

[105] Mandel, 34.

[106] Ibid.

[107] Ibid., 145.

[108] Russell (1983), 38.

[109] Knopff and Morton (2000), 95. While the CCP was initially established to provide solely for language rights cases, it was later expanded to include equality rights cases under s. 15 of the *Charter*. In spite of protest from many of the programme's beneficiaries, the Conservative federal government of Brian Mulroney unexpectedly terminated the programme in 1992, citing financial constraints and completion of the programme's mandate (although some have wondered whether political factors may have been at play in the decision as well, such as the fact that several feminist groups who relied upon the programme for funding opposed certain changes proposed in the 1992 round of constitutional negotiations, which may have contributed to the defeat of the *Charlottetown Accord*). However, the Liberal government of Jean Chrétien reinstated the programme in 1995. See Knopff and Morton (2000), 98-99.

[110] Ibid., 95.

[111] Ibid., 63.

[112] Ibid., 61

[113] See Joseph Eliot Magnet. Official Languages of Canada: Perspectives from Law, Policy and the Future. (Cowansville, Québec: Les Éditions Yvon Blais Inc., 1995), at 241.
[114] Knopff and Morton (2000), 61.
[115] Ibid.

Chapter Two: The Supreme Court and Language Rights: A Restrictive-Liberal Continuum

Introduction

As we have seen, bilingualism has been an important issue for many years as the scheme to entrench bilingualism and language rights into federal legislation and into the constitution has been a key strategy in the quest to secure national unity. Since the late 1970s, with increasing litigation on language rights and with the entrenchment of new language rights into the *Charter*, the legal realm has become a crucial new forum for debate on, and development of, official bilingualism. Indeed, in accordance with Trudeau and his partisans' wish to make the Supreme Court and the federally appointed judiciary the primary protectors of language rights and bilingualism, judicial decisions and their effects are now among the most important factors in the development of bilingualism. However, the judicial interpretation of language rights at the level of the Supreme Court has not always led to the results for which Trudeau would have hoped, which has led to confusion in the lower courts. In this chapter, we will examine the Supreme Court's interpretation of language rights since the passage of the Official Languages Act. In this examination, we will see that over the course of the last three decades, the Supreme Court has been highly inconsistent in its language rights interpretation and has developed two distinct and contradictory approaches to language rights interpretation, one liberal and one restrictive. This has given the lower courts two separate precedential approaches to follow which has had an immense impact on provincial court jurisprudence. In this section, we will explore these two approaches and some of the debate and commentary surrounding each.

In the course of this examination, the two main Supreme Court language rights interpretive approaches at which we will be looking are loosely defined based on my perceptions of the Court's interpretation of the four sub-fields of language rights described in chapter one (and not its interpretation of other rights related to official language minorities, such as education rights). There is certainly not wide agreement on this classification of the Court's approaches and a number of commentators have looked at the Court's approaches differently.[1] Regardless, for our purposes here, the approaches are named based on the most recent or well-known precedent characteristic of the

approach (e.g. the restrictive approach will be referred to as the Acadiens approach, based on the Acadiens case).

The Restrictive Acadiens Approach

While many of the Supreme Court's first opinions on language rights issues of our four-sub-fields after the introduction of official bilingualism were liberal (as we will see), in the mid-1980s, the Court laid down a number of restrictive language rights precedents. These decisions led to the establishment of the Acadiens approach which was characterized by a literal and restrained reading of the language rights provisions, which accorded a great deal of freedom to the legislatures and which was far less favourable to official language minorities than was the liberal approach. This approach has had a significant impact on subsequent language rights interpretation. As we will see in the following chapters, while the characteristics of this approach have been applied in a number of cases by provincial courts, only rarely do these courts make explicit reference to the cases that comprise this approach or the doctrine developed within those cases (the political compromises doctrine). Often these courts will apply the literal and restrained interpretive approach characteristic of Acadiens era jurisprudence while couching their reasons for judgment in other terms. For example, in several of the provincial court language rights cases there was clearly concern on the part of the presiding judge about the proper administration of justice. In these cases, the judges often took a narrow and restrained view of the language rights at issue in order to ensure the administrative convenience of the trial, that traditional common law principles were maintained, or that the administration of justice was not brought into disrepute through a broad interpretation of the language rights. While the reasoning employed by the judges in these decisions may appear to rely on factors related to the administration of justice, these decisions are still usually decided with the aid of interpretive devices characteristic of the Acadiens approach. The courts in such cases are generally still applying a narrow and restrained interpretation which is deferential to the legislatures in valuing the administration of justice over the linguistic rights of the litigants. The Acadiens approach can therefore be seen as the source of some of the reasoning employed in cases where other reasons are cited for the denial of the language rights claim.

Looking at the original restrictive jurisprudence of the Supreme Court, in 1986, the Court ruled concurrently on three important language rights cases. These three rulings led to the reversal of the liberal approach that the Court had previously laid out and led to the establishment of the first restrictive interpretive direction to language rights. One of these three cases concerned the application of s. 133 in Québec. In the case of MacDonald v. City of Montréal,[2] the dispute involved a $30 speeding ticket issued in French only by the City of Montréal to an English-speaking motorist. Before the Court, the motorist, MacDonald, argued that the summons issued to him violated his constitutional rights under s. 133 because it was written in French only. In the Supreme Court's majority opinion, which was written by Justice Jean Beetz (a Quebecer), the Court rejected MacDonald's claim and in doing so, set a crucial new precedent for the interpretation of language rights. The majority opinion stated: "the language rights [in s. 133] are those of litigants, counsel, witnesses, judges and other judicial officers who actually speak, not those of parties or others who are spoken to; and they are those of the writers or issuers of written pleadings and processes, not those of the recipients or readers thereof."[3] More importantly, the majority also provided its opinion on the approach the courts should take in interpreting language rights:

> Section 133 has not introduced a comprehensive scheme or system of official bilingualism, even potentially, but a limited form of compulsory bilingualism at the legislative level, combined with an even more limited form of optional unilingualism...at the option of the speaker, writer or issuer in judicial proceedings or processes....
>
> This incomplete but precise scheme is a constitutional minimum which resulted from a historical compromise arrived at by the founding people who agreed upon the terms of the federal union.... It is a scheme which, being a constitutional minimum, not a maximum, can be complemented by federal and provincial legislation.... And it is a scheme which can of course be modified by way of constitutional amendment. But it is not open to the courts, under the guise of interpretation, to improve upon, supplement or amend this historical constitutional compromise.[4]

With this passage, the Court established a novel interpretive approach and precedent which held that language rights are based on historical compromise and should therefore not be strengthened by judicial interpretation. In addition, the majority also took the extraordinary step of distinguishing between language rights and other 'fundamental' rights: "language rights...are based on a political compromise rather than on principle

and lack the universality, generality and fluidity of basic rights resulting from the rules of natural justice."[5]

The majority's restrictive opinion was too much for one member of the Supreme Court panel, as Justice Bertha Wilson dissented. Wilson openly confronted the conclusion reached by the majority stating: "With all due respect to those who think differently, I cannot read s. 133 as merely permitting the litigant to use the language he or she understands but allowing those dealing with him or her to use the language he or she does not understand. What kind of linguistic protection would that be?"[6] In spite of Wilson's dissent, however, the restrictive approach to language rights had been set.

Another of the three language rights cases decided by the Court in similar fashion that day was the case of Bilodeau v. Attorney General of Manitoba,[7] which concerned an almost identical issue as the MacDonald case. In this case, a motorist, Bilodeau, had received a unilingual speeding ticket in English in Manitoba, which he challenged under s. 23 of the *Manitoba Act, 1870* (a constitutional instrument which admitted the province into confederation). However, the Court relied extensively on the MacDonald ruling in deciding Bilodeau, which resulted in the same outcome for the rights claimant, again over the dissent of Justice Wilson. The third and most important case of the 1986 language rights trilogy was Société des Acadiens v. Association of Parents. While this case originally concerned an issue related to French education in New Brunswick, the issue before the Supreme Court was whether s. 19(2) of the *Charter* contained the right to be understood by a judge in the official language of the litigant's choice. Again, in this case, Justice Beetz wrote the majority opinion.

As was the case in MacDonald, Beetz again drew upon a narrow and literal interpretation of the language rights in the constitution, including those in the *Charter*: "there is no language guarantee, either under s. 133 of the *Constitution Act, 1867*, or s. 19 of the *Charter*, that [the litigant] has the right to be heard or understood in the language of his choice."[8] The right to be understood, he felt, "is not a language right but an aspect of the right to a fair hearing.... It belongs to the category of rights which in the *Charter* are designated as legal rights."[9] Beetz elaborated further on this distinction and its ramifications for constitutional interpretation:

> Unlike language rights which are based on political compromise, legal rights tend to be seminal in nature because they are rooted in principle....
>
> Language rights, on the other hand, although some of them have been enlarged and incorporated into the *Charter*, remain nonetheless founded on political compromise.
>
> This essential difference between the two types of rights dictates a distinct judicial approach with respect to each. More particularly, the courts should pause before they decide to act as instruments of change with respect to language rights. This is not to say that language rights provisions are cast in stone and should remain immune altogether from judicial interpretation. But, in my opinion, the courts should approach them with more restraint than they would in construing legal rights.[10]

With this passage, Beetz once again mandated a conservative and restrictive approach to the interpretation and development of language rights, an approach distinct from that warranted for legal rights. The courts should exercise restraint with regard to language rights, he felt, because their expansion "is linked with the legislative process [through the *Charter*'s] s. 16(3).... The legislative process, unlike the judicial one, is a political process and hence particularly suited to the advancement of rights founded on political compromise."[11] In addition, in an overtly political statement, Beetz commented upon the political rationale for his restrictive approach:

> It is public knowledge that some provinces...were expected ultimately to opt into the constitutional scheme...prescribed by ss. 16 to 22 of the *Charter* [i.e. official bilingualism]....
>
> If however the provinces were told that the scheme provided by ss. 16 to 22 of the *Charter* was inherently dynamic and progressive...and that the speed of progress of this scheme was to be controlled mainly by the courts, they would have no means to know with relative precision what it was that they were opting into. This would certainly increase their hesitation in so doing...[12]

With these openly political considerations guiding his interpretation of language rights, Beetz cemented the restrictive approach to language rights interpretation.

The ramifications of this decision (in addition to the decisions of the other two cases of the trilogy) are substantial. Like the MacDonald and Bilodeau cases, Acadiens contained an interpretation of language rights which was narrow and restrictive, which did not serve for the benefit of the rights claimant. By distinguishing again between principle-based and compromise-based rights, the Court also appeared to establish a hierarchy of rights, even of rights within the *Charter*. Most importantly, by finding that

the growth of language rights can only occur through the legislatures and not the courts (via s. 16(3) of the *Charter*) due to blatantly political reasons, the Court limited the potential for the development of language rights a great deal, removing the judiciary from the process altogether. The judgment also established an important precedent in the field of legal language rights in holding that s. 19 of the *Charter* did not guarantee the right to be understood by a judge in the official language of the litigants.

Also of significance in the Acadiens decision was the fact that the narrow approach applied to rights in the *Charter*. Previously, the Court had held that the *Charter* was to be interpreted purposively and liberally and for the benefit of the rights claimants.[13] In the Acadiens case however, s. 19(2) of the *Charter* was interpreted in a very restrictive and literal fashion, with governments benefiting. This was a complete departure from previous *Charter* jurisprudence (which had been established and affirmed very recently), which was a significant defeat for the proponents of bilingualism who had entrenched language rights into the *Charter* in hopes of a broad and expansive interpretation. In addition, the Court seemed to have undermined the court remedy provision of the *Charter* (s. 24(1)) by suggesting that the courts were not at liberty to provide remedies to claimants for language rights infringements. These effects of the Acadiens precedent were thus significant and very surprising.

The majority's narrow reading again garnered the disapproval of Wilson, who was, in this case, joined in her dissent by Chief Justice Brian Dickson (who had actually written the majority opinion in Bilodeau). In his dissent, Dickson argued: "The constitutional language protections reflect continued and renewed efforts in the direction of bilingualism. In my view, we must take special care to be faithful to the spirit and purpose of the guarantee of language rights enshrined in the *Charter*."[14] For her part, Wilson indicated that a "spirit of vigilance in safeguarding a meaningful exercise of linguistic rights should...inform our approach to ss. 16 and 19 of the *Charter*."[15] Of the Court's abandonment of the purposive approach to *Charter* interpretation, Wilson was highly critical. To her, the majority's opinion "negate[s] the principle of growth which has traditionally been associated with the interpretation of constitutional provisions. Such a finding...run[s] counter to the approach of this Court which has been to give full and purposive meaning to every word of the *Charter*."[16] Wilson also took issue with the

majority's mandating of a restrictive and cautious approach to the interpretation of language rights:

> It seems to me that given the commitment to linguistic duality contained in s. 16 of the *Charter* and the principle of growth implied by that commitment, the Court's process cannot be perceived as static. What may be adequate to-day [sic] in terms of protection for the litigant's right under s. 19(2) may not be adequate tomorrow.[17]

In spite of these vigorous dissents to the establishment of the new precedent, however, the majority had ruled and a narrow and restrictive approach to language rights disputes had been firmly established.

While each of the 1986 cases concerned legal language rights, the Acadiens approach was applied equally to legislative bilingualism in the 1988 case of R. v. Mercure.[18] Like the MacDonald and Bilodeau cases, the dispute that gave rise to this case was a unilingual ticket, in this case a parking violation, issued in English in the province of Saskatchewan. Its recipient, Mercure, argued that Saskatchewan (and by extension, Alberta) was, by virtue of being created out of the Northwest Territory in 1905, still bound by s. 110 of the federal Northwest Territories Act of 1877[19] (a provision similar to s. 133 of the *Constitution Act, 1867*) which had been carried over into Saskatchewan law by the constitutional *Saskatchewan Act, 1905*.[20] The implications of this claim were that s. 110 forms part of the constitution and that therefore Saskatchewan's unilingual laws and court proceedings are unconstitutional. While the Court agreed with Mercure's arguments to some extent and did not posthumously convict him of his parking ticket,[21] the policy effects of its judgment were consistent with the other cases of the Acadiens approach in favouring the government rather than the rights holders.

The majority opinion of Justice Gerard La Forest agreed with Mercure that all laws predating Saskatchewan's entry into confederation, including s. 110, continued to apply by virtue of the *Saskatchewan Act* and therefore warranted enforcement by the courts.[22] However, the majority denied that s. 110 was constitutionally entrenched through the *Saskatchewan Act*, as it was simply a legislative enactment by Parliament which was subject to repeal. It argued: "Parliament knew full well how to entrench a provision if it wished to do so, namely, by expressly providing for language rights in the Saskatchewan

Act as it did in the case of s. 23 of the Manitoba Act."[23] Most importantly, the Court then explained that all that would be required to grant legal effect to all of Saskatchewan's unilingual laws would be for the provincial legislature to use provisions of the *Saskatchewan Act* to (bilingually) repeal s. 110.[24] By explaining how easily the unilingual laws could be maintained, the Court seemed to invite the Saskatchewan legislature to repeal s. 110 and to eliminate the rights of the Fransaskois under that provision. The Court did not strike down the laws (while granting them temporary validity in order to avoid legal anarchy in the province) as it had done in the Manitoba Language Rights Reference (a similar case where all unilingual laws were impugned, discussed later) and did not seek a creative approach by which it could maintain the rights of the minority francophones. Instead, it interpreted the language rights very literally and seemed to implore the government of Saskatchewan to override those rights. Although Justices William McIntyre and Willard Estey dissented to the majority's ruling, this dissent was based on technical legal considerations with the effect for the minority language community in Saskatchewan being the same; it would not have its rights protected by the Supreme Court.

Once again with this case, the Court applied a narrow and literal interpretation of language rights. Rather than finding a measure of protection for the francophone minority of Saskatchewan in the documents leading to Saskatchewan's entry into confederation, the Court interpreted the language rights literally and in a manner that benefited the Saskatchewan (and Alberta) government, rather than the official language minorities. The approach developed in this case as well as the 1986 trilogy mitigated the responsibility of the judiciary in protecting language rights and left the official language minorities on their own to develop their rights through the legislative process. Of particular importance throughout the restrictive approach was the 'Political Compromises' doctrine of MacDonald and Acadiens. With this, the Court distinguished between legal rights and language rights and explicitly mandated a cautious and restrained approach to the interpretation of the latter, as well as deference to the legislatures for the purposes of the advancement of language rights.

Commentary on the Acadiens Approach

This Acadiens approach has occasioned a plethora of commentary, only a fraction of which will be discussed here. The vast majority of this commentary has been highly critical. Among the most critical of this approach is Joseph Eliot Magnet who sees the Court's Acadiens approach as a "significant, costly error."[25] He argues that the Acadiens approach transformed a right for minorities to use their language into a right for the majority (acting through the majority institutions of the government) to use its language[26] and he accuses the Court of interpreting language rights "narrowly in ignorance of their purposive drive."[27] Of the Court's decision to leave to the (provincial) legislative process the task of expanding language rights, Magnet is scathing and vitriolic in his critique:

> the Court would seem to have travelled to the other side of the reality principle. The provinces are not in the mood – and never have been in the mood in Canadian history – to advance language rights. Canadian history is a history of bitter, dangerous conflict fought over language rights as a result of stingy, vindictive aggression by provincial majorities. It is a dangerous history, resulting in federal-provincial conflict, heightened tension between Ottawa and Québec, sullen brooding in French Canada, suspicion, hostility, and growth of nationalism in Canada's regions, particularly in Québec.... Canada's political system cannot control these pathological crises. Each new conflict threatens the security of this country. That is why they are given to the courts. Courts are expected to channel political conflict into legal procedure, and to enforce a consistent bright line.[28]

Indeed, Magnet feels that the entire strategy to protect minority language rights through the judiciary has been a failure: "Canadian history reveals time and again that the judicial enforcement of...language rights...is inadequate and unsatisfying."[29]

Magnet's colleague at the University of Ottawa, André Braën, is also highly critical of the Acadiens approach. In relation to the Court's determination that a right to be understood in the official language of choice in the courts does not exist, Braën wonders aloud: "of what use is the right of a person to use French or English before a court if, on the other hand, he has no guarantee that he will be understood."[30] Braën is similarly confused that the Court provided the right to be understood only through the legal rights contained in the *Charter*. He argues that this approach will put the official language minorities on the same plane as any other linguistic minority in the courts (i.e. having only the right to an interpreter) in spite of the special status accorded the official languages and their speakers in the *Charter*.[31] Braën is particularly disappointed in the

Court's abandonment of any role in the development of language rights due to the political compromises doctrine.[32] Commenting on the entirety of the Court's approach in the Acadiens era, Braën states: "One might legitimately ask what became of the egalitarian principle that is supposed to guide the interpretation of language rights in Canada."[33]

Equally disapproving of the Acadiens approach is Alan Riddell. Riddell criticises the Court's restrictive and fixed interpretation of language rights which he characterises as "statique et stérile."[34] He is also highly critical of the Court's political compromises doctrine which he feels is an unconvincing and inappropriate interpretive approach. Among his many criticisms of the doctrine, Riddell points out that "l'article 15 est également le fruit d'un 'compromis politique'," as is s. 7 of the *Charter*.[35] He also indicates that the Supreme Court has never hesitated in the past to generously interpret the political compromises of the *Constitution Act, 1867* and did not hesitate to rule on the political issues involved in the Patriation Reference.[36] The author also explains that political compromises such as language rights are so politically sensitive that they are generally very difficult to amend or augment politically, making it all the more important for the Courts to take an active role in this process, as the legislatures may be unable to do so.[37] To Riddell, the decisions of the Acadiens approach "retardent gravement la progression du bilinguisme judiciaire et législatif,"[38] and threaten all of the rights contained in the *Charter*, as well as the very evolution of the Canadian constitution.[39]

Former constitutional law scholar, Michel Bastarache (an Acadian) is also very critical of the Acadiens approach in his scholarly writing. Bastarache characterises the Acadiens approach as a "shocking reversal"[40] of the Court's earlier, liberal approach to language rights interpretation and points to a number of ways in which the Acadiens approach contradicted earlier Supreme Court precedents.[41] He states: "it would seem that language rights are designed to protect languages *per se* and not those who speak an official minority language and seek the protection of the courts, an unexpected and, I would suggest, a regressive development."[42] Like many others, Bastarache is very disparaging of the political compromises doctrine. He asks: "There are, of course, political factors to be considered in determining the scope of constitutional rights, but can these political considerations effectively derogate from fundamental rights?"[43]

Bastarache feels that to refuse an activist approach on language rights for these reasons is to repeat the mistakes made in the interpretation of s. 93 of the *Constitution Act, 1867* which provided little protection to linguistic minorities.[44]

In addition to the problems with the political compromises doctrine, Bastarache also questions the Court's logic in arguing that the *Charter* contains only a progression toward equality and not an immediate mandating of equality for the official languages. He indicates that if s. 16(3) stands only for the eventual progression toward equality, s. 16(1) (which appears to call for equality without qualification) would be unnecessary and redundant. Similarly, if the language rights of the *Charter* are based only on an eventual goal of equality, then the federal government would not be obligated to provide services in both official languages (under *Charter* s. 20) now, only to progress toward that goal.[45] Lastly, Bastarache criticises the Court's decision to give the legislatures sole responsibility for the advancement of language rights. He argues that official language minority groups do not have the power or numeric strength to exert the necessary pressure on the legislatures to ensure that their communities and rights are protected. He cites the example of the fallout from the Mercure decision (in which the rights of French speakers in Saskatchewan and Alberta were largely abandoned[46]) to prove this point.[47]

Another scholar, Luc Huppé, is also unconvinced by the Acadiens approach which he characterises as "discutable" and "artificielle."[48] He questions the Court's interpretation of s. 16(1) arguing that it erred in ruling that that provision is only a declaratory statement with no substantive effect. He feels that s. 16(1) should have "des obligations substantives indépendantes des examples" contained in ss. 17 through 22.[49] Like many of his colleagues, Huppé too is critical of the political compromises doctrine. He questions the Court's reliance on such political factors when the government of one of the most fertile jurisdictions for language rights disputes, Québec, did not assent to the political process (constitutional patriation) which resulted in the entrenchment of the *Charter* language rights.[50] This province, which is so important to the development of language rights in Canada, is, he suggests, unlikely to be generous in advancing the constitutional language rights which it has opposed in the past.

A number of other scholars have criticized the Acadiens approach as well, although less extensively. This includes a number of anglophone scholars which demonstrates that

the Acadiens approach has met with disapproval in English Canada as well as in French Canada. For example, C. Michael MacMillan questions the Court's distinguishing between legal rights and language rights based on the political compromises doctrine, particularly as they relate to the constitutional override. He writes: "the capacity of governments to override legal rights and civil liberties via Section 33 renders all of these rights creatures of political compromise."[51] In addition, MacMillan highlights the seeming contradiction between the Court's interpretation of the importance of the two sets of rights and the intentions of the framers of the *Charter*:

> It is rather intriguing that language rights in the Charter, unlike the fundamental freedoms and legal rights that are the acknowledged 'seminal rights,' are *not* subject to the Section 33 override clause in the Charter. Presumably, a case could be made that this suggests a rather different weighting of the relative importance of the two sets of rights noted above – one that assigns constitutional priority to language rights.[52]

"However," he continues, "these themes were not pursued in the various [judicial] opinions offered."[53]

The Court's approach to *Charter* language rights interpretation which emphasises the political circumstances underlying language rights is equally unconvincing to Leslie Green and Denise G. Réaume. They highlight the fact that in the BC Motor Vehicle Reference,[54] the Supreme Court ruled that the political factors underlying the drafting of the *Charter* were to be given only minimal weight.[55] Further, they argue that "[t]he [political compromises] argument fails because the fact that some *Charter* right is not grounded in a pre-existing natural right does not show that there are no other urgent, moral reasons that pre-exist it, justify its enactment, and direct its further development."[56] Similarly, to Green and Réaume, the distinction made in the Acadiens approach between compromise-based language rights and legal rights is a dangerous development in constitutional interpretation which threatens to undermine all *Charter* rights.[57]

In reviewing this criticism of the Supreme Court's Acadiens approach, which is only a sample of the critiques available (much more criticism of the approach has been offered which we have not discussed here[58]), we can see that the Acadiens approach has been very controversial. While the restrictive interpretation and the contentious political compromises doctrine are largely responsible for the academic criticism the approach has

received, undoubtedly, the divergence from the liberal approach established previously by the Court (which would be adopted again several years after Acadiens) contributed to the dislike of the approach felt by many commentators. Irrespective of how it was received in the academic community, the Acadiens approach forms one of the Supreme Court's two major interpretive approaches which the lower courts were ordered to follow. The other is the liberal approach.

The Initial Liberal Approach

Both prior and subsequent to the cases which formed the foundation of the Acadiens approach, the Supreme Court decided a number of cases in an entirely different, even contradictory fashion. In the late 1970s and early 1980s, as well as in the late 1990s, the Court released a number of decisions in which it interpreted language rights provisions expansively and purposively, in a way oriented toward the expansion of the bilingualism regime and the protection of the minority language communities. With these decisions, the Court established its liberal interpretive approach, an approach I sometimes refer to as the Beaulac approach. As we will see, this approach is somewhat of a polar opposite to the Acadiens approach which means that the Court can be said to have offered two distinctive interpretive options from which the lower courts have had to choose.

Apart from the way in which language rights are treated, one of the ways in which the liberal approach can be distinguished from its restrictive counterpart is that it can be divided into two phases. The first phase (which I will sometimes refer to as the 'Blaikie' phase of the approach, after two of the cases decided in that era) was common in the early years that the liberal approach was applied, the late 1970s and early 1980s. While this phase of the approach shares much in common with the later phase, particularly the purposive and expansive interpretation of language rights, it is slightly different. The primary difference between the two phases is that the Blaikie era was marked by an expansive interpretation of language rights within the dispute itself. Rarely did the decisions of the Blaikie era make sweeping advances for language rights that extended far beyond the parameters of the linguistic dispute at bar, a tactic the court used only later in its liberal interpretation.

The Supreme Court's first liberal judgments in the four sub-fields with which we are concerned dealt with the always-contentious issue of legislative unilingualism. In the case of Attorney General of Québec v. Blaikie (Blaikie no. 1),[59] the Court heard a constitutional challenge (based on s. 133) to certain provisions of Québec's Bill 101 which made the French versions of legislative records the only official versions and French the only language of quasi-judicial tribunals (such as boards or commissions, which are not technically courts, but exercise judicial authority). Similarly, in Attorney General of Manitoba v. Forest,[60] the Court heard a challenge to Manitoba's 1890 Official Language Act, a law which eliminated the use of French in Manitoba government institutions and courts, ostensibly in contravention of s. 23 of the *Manitoba Act* (the same provision which gave rise to the Bilodeau case).

In deciding these two cases, which it did concurrently, the Supreme Court applied its liberal approach to language rights interpretation. In Blaikie no. 1, the Court, in a *per curiam* decision, struck down the provisions making French versions the only official versions of legislative records and made use of the famous 'Living Tree' doctrine established in the Persons Case[61] to determine that s. 133 also includes quasi-judicial tribunals. It stated: "[the Persons Case] lend[s] support to what is to us the proper approach to an entrenched provision, that is, to make it effective through the range of institutions which exercise judicial power, be they called courts or adjudicative agencies."[62] In this way, the Court "demonstrated a willingness to enlarge the scope of the literal words" of s. 133.[63]

In Forest, the judgment of "The Court" was similarly liberal in its striking down of Manitoba's unilingualizing legislation. It said: "The conflict between [s. 23 of the *Manitoba Act* and the Manitoba Official Language Act] is obvious."[64] It continued: "The Manitoba Act is a federal statute which means that, unless otherwise provided, it is subject to amendment by the Parliament that enacted it and no other."[65] Comparing the situation in Manitoba to the situation in Québec in light of the judgment in Blaikie no. 1, the Court ruled: "It is enough to note that on any view it certainly cannot result in Manitoba's legislature having toward s. 23…an amending power which Québec does not have toward s. 133."[66] Thus, in these two cases, a unanimous and anonymous Court was unsympathetic to attempts by provincial legislatures to undermine the rights of official

language minorities and struck down legislative provisions using liberal interpretive instruments (such as the 'Living Tree' approach) to protect the rights of the minorities. The constitutional texts at issue were interpreted expansively and purposively and the Court refused to allow the language rights to be undermined by the provinces.

After the decision was rendered in Blaikie no. 1, the government of Québec asked for a clarification of what exactly was covered under the scope of s. 133 of the *Constitution Act, 1867*. In its response in Attorney General of Québec v. Blaikie (Blaikie no. 2),[67] the Court, again in a *per curiam* decision, found a regime of bilingualism in Québec with a very wide scope.[68] In this case too, the Supreme Court maintained consistency with its interpretive approach of the time, interpreting language rights in a broad and expansive way, to the advantage of those the rights were intended to benefit. The Court found within the language rights at issue a principle of growth and expanded the provisions of s. 133 beyond the literal words of the *Constitution Act, 1867* for the benefit of the linguistic minority.

Another case in which the Court applied a liberal interpretive approach to language rights was the Manitoba Language Rights Reference.[69] After the decision of the Court in Forest, the province of Manitoba had attempted to find a solution which would protect the rights of Manitoba's francophone community while allowing all of the legislation that had been passed unilingually (and ostensibly unconstitutionally) since the Official Language Act of 1890 to remain valid. However, no easy solution to the dilemma was found and Manitoba soon found itself in the midst of a bitter and divisive constitutional crisis. As a result, the federal government took action by referring to the Supreme Court a number of questions about the validity of Manitoba's post-1890 legislation.[70]

In its judgment, the Supreme Court, once again *per curiam*,[71] provided one of its most expansive interpretations of language rights in defence of official language minorities and a clear articulation of the role of the judiciary in protecting official language minorities:

> Section 23 of the *Manitoba Act, 1870* is a specific manifestation of the general right of Franco-Manitobans to use their own language. The importance of language rights is grounded in the essential role that language plays in human existence, development and dignity. It is through language that we are able to form concepts; to structure and order the world around us. Language bridges the gap between isolation and community, allowing humans to delineate the

> rights and duties they hold in respect of one another, and thus to live in society.
>
> The constitutional entrenchment of a duty on the Manitoba Legislature to enact, print and publish in both French and English in s. 23 of the *Manitoba Act, 1870* confers upon the judiciary the responsibility of protecting the correlative language rights of all Manitobans including the Franco-Manitoban minority. The judiciary is the institution charged with the duty of ensuring that the government complies with the Constitution. We must protect those whose constitutional rights have been violated, whomever they may be, and whatever the reasons for the violation.[72]

With these reasons, the Court established an important new precedent relating to the protection of language rights and the judiciary's role in this process. In the case at bar, the Court determined that all unilingual legislation enacted by Manitoba since 1890 (most of the legal regime of the province) was invalid and of no force or effect.[73] However, relying on the principle of the 'Rule of Law' in order to avoid legal anarchy in the province, the Court granted temporary validity to the unilingual statutes, only until such time as the province could translate and re-enact all of its laws.[74] It said: "the courts will not allow the Constitution to be used to create chaos and disorder.... The Constitution will not suffer a province without laws."[75] As a result of this case, Franco-Manitobans regained all of the rights and privileges they possessed through the *Manitoba Act, 1870.* In an effort to protect the rights of Franco-Manitobans, the Supreme Court took the unprecedented step of invalidating nearly all of Manitoba's laws (though granting them temporary validity) and ruled that all laws be translated and re-enacted bilingually, an approach it refused to take just three years later under similar circumstances in Mercure. This striking down of most of Manitoba's legal regime is perhaps the most remarkable example in this era of the Court interpreting language rights in a liberal and purposive fashion. The Court read the language rights contained in s. 23 of the *Manitoba Act* liberally (in spite of the costs of doing so, i.e. the invalidation of nearly a century of Manitoba law) and provided a strong role for the judiciary in protecting and enforcing the language rights. The Court went to extraordinary lengths to provide a liberal meaning of the rights in question and did so expressly for the purpose of protecting the linguistic minority. The fact that this expansive precedent was rendered just eleven months before the restrictive Acadiens trilogy of 1986 is indicative of the variability and inconsistency

of the Court's decision making, inconsistency which we will see had an important effect on the lower courts.

With these early language rights decisions, the Supreme Court established an approach to the interpretation of language rights which was liberal and purposive, an approach which contrasts starkly to the restrictive approach which was soon to follow. With the decisions of this era, the Court did not hesitate to engage in activism to strike down legislation which was deleterious to the rights of linguistic minorities. Although this liberal approach was temporarily brushed aside by the Court in favour of the Acadiens approach, it would be recalled again in later years in strengthened form.

Commentary on the Early Phase of the Liberal Approach

Before moving to a discussion of the latter phase of the liberal approach, consideration of some of the (albeit limited) commentary on the Blaikie phase is warranted. Among those who look upon the approach favourably is Riddell, who characterises the Court's interpretation as "téléologique, libérale et évolutive"[76] and as consistent with "l'esprit des Pères fondateurs."[77] Riddell applauds the Court for interpreting language rights in this manner and for ruling in favour of the official language minorities when faced with textual ambiguities.[78]

Similarly, Magnet commends the Court's early liberal approach: "The Court made clear that official bilingualism guarantees were entrenched provisions, tolerating no unilateral contraction of the protections therein declared. The Supreme Court interpreted the language protections expansively with the aid of a principle 'of growth'."[79] More forcefully, he comments:

> the Court had found in the terse phrasing of ancient constitutional texts a system of minority protection. Through a purposive, expanding, dynamic interpretation, the Court set out to reconstruct these special protection [sic] so to ensure full and equal access for the minority, in a meaningful way to...governmental institutions...[80]

A number of other sources have favourably commented on the Blaikie era, as well. For example, the Commissioner of Official Languages, felt that in the Blaikie era cases, the Court "sought to apply language guarantees broadly and as a function of their underlying purpose."[81] Likewise, C. Michael MacMillan commends the Court's "expansive reading of Section 133 [which] reached its zenith in the *Manitoba Language*

reference."[82] Braën laments only that the Court has not applied this "liberal approach"[83] consistently and sufficiently.[84]

Not all academic commentators were quite so enthusiastic and praising of the Blaikie era jurisprudence, however. Writing after the passage of the *Charter*, Bastarache felt that the *Charter* mandated a revisiting and expansion of s. 133 jurisprudence: "the spirit of the Canadian Charter of Rights and Freedoms calls for a broader interpretation of s. 133 [than what had to that point been laid down]."[85] This quote provides important insight into Bastarache's thinking on language rights interpretation. Bastarache would later be fortunate enough to have opportunity to grant his own wish.

Also critical of the Court's Blaikie era approach, but for different reasons, is Mandel. Mandel is particularly disparaging of the "legal hocus-pocus"[86] employed by the Court in declaring the unilingual laws of Manitoba invalid, though temporarily valid in the Manitoba Language Rights Reference, which he feels made the "constitution rather superfluous [and revealed] rather starkly how little constitutional documents restrain their 'interpreters'."[87] Referring to the inconsistency of the Blaikie era liberal decisions with the restrictive decisions of the Acadiens era, Mandel chastises the Court for the "cat-and-mouse way in which these constitutional rights were interpreted."[88] While Mandel was critical of the Court's about-face on language rights interpretation in the mid 1980s, he would likely be even more upset with the Court in the late 1990s, when, in many ways, it changed its mind again and switched back to the liberal interpretation.

The Second Liberal Approach: The Beaulac Approach

While the Acadiens approach mandated that only the legislatures were sufficiently competent to develop official bilingualism and language rights in Canada, this approach was subject to "tempering"[89] by both Parliament and the courts almost immediately. For example, in 1988 the federal government passed an updated Official Languages Act. In doing so, Parliament amended the Criminal Code to include s. 530 which contains a number of provisions allowing the criminally accused to have their trial conducted in the official language of their choice (or both languages) without an interpreter.[90] According to the provisions of the Code, even if an accused decides to pursue this option after the trial has commenced, the granting of such an application is possible, subject to the

judge's discretion. In making this decision, the judge must consider 'the best interests of justice.'

Similarly, the Supreme Court itself appeared to depart from the literal approach to interpreting constitutional provisions affecting official language minorities of the Acadiens era in the cases of Reference re Bill 30 (1987), Mahe v. Alberta (1990) and Reference Re Public Schools Act (Manitoba) (1992).[91] While it is true that these cases concerned education rights and not the language rights of our sub-fields, the Court's discussion about "breathing life"[92] into the political compromises affecting official language minorities was somewhat of a diminution of the political compromises doctrine.

Perhaps most importantly for our purposes, the Court established a landmark precedent in the case of Reference re Secession of Québec in 1998.[93] In this decision, the Court stipulated that the protection of minorities was one of the four foundational principles of the Canadian constitution and that these principles are binding on both courts and governments.[94] While this case too did not directly concern language rights, the Court's ordering of judicial protection of minorities, even in cases where political compromises underlie the constitution, provided hope to official language minorities that the courts would, once again, interpret their language rights in a more liberal fashion. This case proved to be an important precedent in future language rights jurisprudence. Like the Beaulac case which was rendered less than a year later, this case also ordered the lower courts to adopt a generous interpretation of provisions affecting linguistic minorities and freed those courts from the restrained political compromises doctrine. While Beaulac provided the explicit directions on how to interpret language rights, the Secession Reference has provided provincial courts with another avenue with which to interpret such rights liberally. The provincial courts have responded favourably and, as we will see in subsequent chapters, have cited the Secession Reference, in addition to Beaulac, in several instances in justifying their liberal interpretation. While the approach outlined in Beaulac provides the primary justification (and precedent) for such an interpretation, the Secession Reference has served as another source of generous language rights interpretation for the provincial courts and is thus an important precedent in this context.

Notwithstanding the slight departures from the Acadiens approach in some of the Supreme Court's post-Acadiens jurisprudence, that approach continued to stand as the most recent and binding precedent for language rights jurisprudence for several years. It would not be until 1999, when the Supreme Court decided a relatively obscure murder case, that this precedent would be overturned. When the Court used the opportunity created by this case to revisit its approach to language rights adjudication, it established an approach to the interpretation of language rights which was more liberal and purposive and provided more protection to official language minorities than either the Acadiens approach or even the earlier phase of its liberal approach. The effects that this new liberal approach (the Beaulac approach) would have on language rights jurisprudence would be significant.

The case that led to the overturning of the Acadiens approach was the case of R v. Beaulac. While this case has a long and complicated history,[95] the primary issue before the Supreme Court was the issue of whether the British Columbia courts which had decided the trial of an accused murderer, Beaulac, had erred in refusing to grant him a trial in his native French, under s. 530(4) of the Criminal Code. As this case was one of the first (non-education) language rights cases to be heard by the Supreme Court since the mid 1980s, however, the majority of the Court used the opportunity to establish a new interpretive approach for language rights. Interestingly, the majority opinion was written by none other than former law professor and language rights advocate, now Supreme Court justice, Michel Bastarache.

Before addressing the concrete legal issues at bar, on behalf of the majority, Bastarache made use of the relatively technical language rights dispute in Beaulac's case to revisit the precedent established in the Acadiens era. In explicit terms, he and the majority took the extraordinary step of attacking the political compromises doctrine, then ruling on the equality accorded to Canada's official languages in the constitution, as well as the state's related obligations:

> Though constitutional language rights result from a political compromise, this is not a characteristic that uniquely applies to such rights.... [T]here is no basis in the constitutional history of Canada for holding that any such political compromises require a restrictive interpretation of constitutional guarantees...the existence of a political compromise is without consequence with regard to the scope of language rights. The idea that s. 16(3) of the

> *Charter*, which has formalized the notion of advancement of the objective of equality of the official languages of Canada...limits the scope of s. 16(1) must also be rejected. This subsection affirms the substantive equality of those constitutional language rights that are in existence at a given time.... This principle of substantive equality has meaning. It provides in particular that language rights that are institutionally based require government action for their implementation and therefore create obligations for the State.[96]

In even more direct terms, the majority then overruled the Acadiens precedent and its underlying logic, while explicitly repudiating the arguments advanced by Justice Beetz in Acadiens. It stated:

> Language rights must in all cases be interpreted purposively, in a manner consistent with the preservation and development of official language communities in Canada.... To the extent that *Société des Acadiens du Nouveau-Brunswick*...stands for a restrictive interpretation of language rights, it is to be rejected. The fear that a liberal interpretation of language rights will make provinces less willing to become involved in the geographical extension of those rights is inconsistent with the requirement that language rights be interpreted as a fundamental tool for the preservation and protection of official language communities where they do apply (emphasis in original).[97]

The Court ruled that the correct interpretive approach to language rights is to guarantee substantive equality for the two official languages and to ensure that when institutional bilingualism is called for (such as in s. 530 of the Criminal Code, s. 133 of the *Constitution Act, 1867*, or ss. 16-22 of the *Charter*) "equality must be given true meaning... [by governments which must provide] equal access to services of equal quality for members of both official language communities in Canada."[98] The majority of the Court thus re-established and reinforced the liberal and purposive approach to the interpretation of language rights in Canada. In dramatic fashion, it ruled that without exception, language rights are to be interpreted in a way which serves the development and enhancement of official language communities and of substantive equality and that they cannot be undermined through a narrow and restrictive interpretation, regardless of the political consequences.

With this reasoning, a landmark new language rights precedent had been established and a new approach to language rights interpretation had been mandated. While the reasoning employed in Beaulac clearly overrules the Acadiens approach and forbids the restrictive and literal political compromises approach that characterizes it, as alluded to

previously, it can also be distinguished from the earlier liberal approach. The decisions of the Blaikie era tended to interpret constitutional text in a liberal manner which encompassed a principle of growth. They also tended to find within the relevant texts an expansive interpretation of the language rights, applied liberally *to the case at bar* (for example, finding quasi-judicial tribunals to be affected by s. 133). In the Beaulac case, however, the Court used the general purpose underlying the constitution to find that language rights cases must *always* be interpreted liberally, regardless of circumstance or the exact wording of the text (and not simply in the case at bar). Unlike the Blaikie-era cases, Beaulac did not ground its liberal and expansive interpretation in the text and dispute at bar, but stated explicitly that language rights were to be interpreted liberally 'in all cases.' The majority of the Court established this approach before even addressing the case at bar. This difference is significant. While the Blaikie Court was willing to interpret specific language rights provisions liberally in specific cases, the Beaulac Court did not attach its liberal interpretation to circumstances. The Beaulac phase of the liberal approach is thus more liberal than is the Blaikie phase. In establishing an interpretive approach which overrules the Acadiens precedent and is even more liberal than the Blaikie jurisprudence, the influence of Justice Bastarache, the author of the majority opinion, is palpable, as he had previously complained that both approaches provided insufficient protection to official language minorities.[99]

When it applied this new approach to the case at bar, the majority also established an important new precedent in the field of legal language rights. Bastarache and the majority ruled that s. 530 of the Criminal Code provides an "absolute right of the accused to equal access to designated courts in the official language that he or she considers to be his or her own," which means that "[t]he courts called upon to deal with criminal matters are...required to be institutionally bilingual in order to provide for the equal use of the two official languages."[100] This equality, the court ruled, is to be meaningful and substantive and one language or linguistic group must not be treated as the majority with the other treated as the minority which must be accommodated. [101] On the issue of an accused's application to be tried in the language of their choice, the court ruled that "[generally] the best interests of justice will be served by accepting the application.... Therefore, it is the denial of the application that is exceptional and that needs to be

justified." [102] Importantly, the Court also stated that "mere administrative inconvenience is not a relevant factor,"[103] in justifying such exceptional circumstances. This reasoning established that a s. 530 application could only be denied in exceptional circumstances, which, according to the Court, Beaulac's circumstances did not constitute. Accordingly, his conviction was overturned and the case was ordered to commence again in French.

While the majority of the Court agreed with the decision written by Bastarache, Justice William Binnie and then-Chief Justice Antonio Lamer concurred with the majority opinion, but disagreed with revisiting the Acadiens approach (although not on the majority's disposal of the issue). As the only member of the Court who was present for the Acadiens decision and as one of the Justices who concurred with the majority opinions of Justice Beetz at the time, it is not surprising that Lamer would disagree with the reversal of that decision. In their concurring opinion, Lamer and Binnie wrote:

> we do not consider this to be an appropriate case to revisit the Court's constitutional interpretation of the language guarantees contained in s. 16 of the [*Charter*]. It is a well-established rule of prudence that courts ought not to pronounce on constitutional issues unless they are squarely raised for decision. This is not a constitutional case. It is a case of statutory construction.[104]

These two justices suggested that:

> the process envisaged by Beetz J. and the majority in *Société des Acadiens*...is illustrated by the enactment of s. 530 itself, which addresses a particular aspect of language rights and develops a comprehensive statutory procedure to vindicate those rights.... A re-assessment of the Court's approach to *Charter* language rights developed in *Société des Acadiens* and reiterated in subsequent cases is not necessary or desirable in this appeal which can and should be resolved according to the ordinary principles of statutory interpretation....[105]

Through this concurring opinion, Justice Binnie and one of the original architects of the Acadiens approach, Chief Justice Lamer, objected to the majority's usage of the Beaulac case (in which no constitutional issue had been raised by the appellant) to overturn the Acadiens approach. Although the Justices seemed to validate the Acadiens approach in their opinion, in some ways, they can also be said to have provided an opinion consistent with the Blaikie liberal interpretative approach. The two judges did not dissent on the result of the majority's opinion (to interpret the statutory language rights in a manner which overturned Beaulac's conviction) and objected only to the

majority's establishment of a broad new approach which extended well beyond the confines of the dispute at bar. Presumably, the justices would have preferred a majority opinion which resolved the issue at bar in the same fashion, without leaving the parameters of the dispute and without establishing the broad new interpretation which applies to all future circumstances. While the intentions of the two concurring justices are impossible to ascertain with certainty, it is possible that they sought a reaffirmation of the original liberal approach (that of the Blaikie era), rather than the establishment of a new and more broadly liberal approach. However, due primarily to turnover on the Supreme Court bench, the new liberal Beaulac approach was established in spite of this opinion.

Thus, with the establishment of the Beaulac precedent, Canada has entered into a new era in the interpretation of language rights. Like the Acadiens precedent, this case is important not only due to its establishment of a new interpretative approach to language rights, but also due to the precedent that it establishes in relation to legal language rights. Beaulac has not only determined that the courts must interpret language rights purposively and liberally at all times, but also that provincial criminal courts are obligated to be institutionally bilingual, a finding which, we will see in subsequent chapters, has been very contentious. It is thus a seminal case in Canadian constitutional law whose effects have been wide-ranging and profound. It also represents the culmination of Michel Bastarache's career of advocacy for, and on behalf of, bilingualism and official language minorities.[106]

Commentary on the Latter Liberal Approach

In spite of the significant importance of the Beaulac case for the interpretation of language rights and official bilingualism in Canada, the case has received little scholarly or media attention. Indeed, some constitutional law scholars may even be unaware of its existence.[107] This fact is puzzling in light of the importance of language rights and bilingualism in Canadian politics. There are a number of possible explanations for why this case has received so little attention. One possible explanation is that in May, 1999 when Beaulac was released, deficit fighting, neo-liberal politics and the Ontario election were the primary foci of Canadian politics and the Beaulac case and its ramifications for bilingualism may not have been judged to be sufficiently important and worthy of

attention by political scientists, legal scholars and the media.[108] Another possible hypothesis is that the effects of the case were not well understood by the media and other analysts, as anyone reading the case would have to have a detailed understanding of the case law and language rights precedents to have a full understanding of the crucial effects of the decision. The limited coverage of the case in the English Canadian media, which tended to focus on Beaulac's having to stand for a fourth trial and not the constitutional significance of the case, may lend credence to this hypothesis.[109]

One of the reasons which may have been most responsible for the lack of public response to the Beaulac case is that that decision was released by the Supreme Court on the same day as two other cases, one of which was the controversial M. v. H.[110] decision on spousal benefits for gay and lesbian couples. With most media, political and legal commentators focused on the landmark M. v. H. decision, it is possible that Beaulac was simply ignored or not noticed by those who would otherwise comment on the case.[111] With the establishment of an extremely controversial judgment on same-sex relationships that day, many commentators may have felt that an unknown murder case which was ultimately sent back for a retrial seemed unimportant or uninteresting. Some have suggested that given the activism of the Beaulac decision and the potentially controversial new precedent that it established, the Court may have deliberately released it on the same day as another case which it knew would garner a great deal of attention and criticism, in order to have the effects of the case go unnoticed.[112] Regardless of the reasons for the lack of commentary on the case, the Beaulac precedent seems to have not yet been fully explored.

Of those who have noticed the case, one of the first and most thorough scholarly analyses on it comes from Braën. In his examination and summary of the case, Braën applauds the majority of the Court for taking the opportunity to expand the scope of language rights (in spite of the lack of constitutional issues raised in the case)[113] and for finally rejecting the restrictive interpretation of language rights put forward in the Acadiens approach.[114] He writes: "of the [restrictive and liberal approaches to language rights] put forward by the Supreme Court, it is the liberal approach that triumphs in the end."[115] His only hesitation in his praise of Beaulac is his worry that the provinces will now adopt the cautious and restrained approach to the development of language rights

which was previously characteristic of the courts (as Justice Beetz had feared), now that the courts are able and willing to advance the development of language rights.[116] In spite of this caveat, though, Braën is generally very satisfied with the Court's new Beaulac approach.

Another scholar who praises the Court for its new Beaulac approach is Michel Doucet. Doucet applauds the Court for eliminating the hierarchy of rights that had been established in the Acadiens era[117] and for bringing the courts back into the process of the development of language rights.[118] He also suggests that the judiciary is now empowered to sanction legislatures that act in ways that are detrimental to official language minorities, which has the effect that these minorities are no longer at the mercy of the provincial majorities.[119] Due to the Beaulac case (together with two other cases that intimately affect official language minorities[120]), Doucet suggests that governments can no longer be content to merely accommodate linguistic minorities, but must "prendre les mesures correctives"[121] and must work toward their development and the advancement of equality: "[les] gouvernement[s] a l'obligation positive d'agir et d'adopter, s'il y a lieu, des mesures correctives afin de favoriser la progression vers l'égalité des deux communautés de langues officielles."[122] To Doucet, the effects of Beaulac (and the other cases he mentions) are that all actions or omissions of the government that are deleterious to the official language minority are now illegal,[123] a development he wholeheartedly welcomes.[124]

Others have favourably commented on the decision as well, although less extensively. For example, to Julius Grey, a lawyer for Québec anglophones, the effects of the decision are clear: "C'est la fin de tous les arguments techniques à l'encontre des droits des minorités linguistiques."[125] The Commissioner of Official Languages is similarly happy with the establishment of the new Beaulac approach. In her report on the development of language rights in the Canadian courts, the Commissioner commends the Supreme Court for clarifying the previously "diverging approaches"[126] in language rights jurisprudence. In her opinion, the Beaulac decision provides a "much needed unified approach to the interpretation of official language rights generally."[127] She adds: "the Supreme Court has provided the tools for a more coherent and just implementation of language rights in the future."[128]

Not all assessments of the Beaulac precedent have been favourable, however. One particularly detailed critique of the case comes from Réaume. While Réaume applauds the Court for overturning the political compromises doctrine, she argues that the entirety of the Court's restrictive interpretation was not overruled by Bastarache and the majority in Beaulac.[129] She suggests that the Acadiens approach viewed language rights as negative liberties which in the judicial setting consist only of the right of litigants not to have their use of the minority official language interfered with by the state. To Réaume, this approach treats language as simply an instrument of communication and not a cultural good with inherent value.[130] In her mind, rather than overturning this tenet of the Acadiens approach and looking at languages as important in themselves the Beaulac approach continues to rob language rights of some of their value.[131] Recognizing language rights as positive rights, she suggests, would lead to obligations on the state to accommodate litigants' use of language (such as a state obligation to understand the litigants in their language, not simply to allow them to speak in that language).[132] In her view, the Court failed to take this step, which leaves the door open for another restrictive approach to language rights in the future.[133] Réaume thus calls on the Court to take this final step in eliminating the Acadiens approach which she feels would provide the necessary protection to the official language minorities.[134]

In spite of these few comments about Beaulac, little attention has been paid to the Supreme Court's latest liberal approach, which suggests that many Canadians may be unaware of this important new direction in constitutional law. However, due to the Beaulac approach, which represents the Supreme Court's most expansive approach to the interpretation of language rights, the development of official bilingualism is once again within the purview of the judiciary. The potential effect that this new approach could have on the development of official bilingualism is immense.

Conclusion

As we have seen, in its interpretation of constitutional and statutory language rights, the Supreme Court has adopted two distinct approaches to language rights. These approaches are the liberal Beaulac approach, based on an expansive and purposive reading of language rights (which can be broken down further into two liberal strains, that applied in the early liberal era of language rights interpretation and that of the Beaulac

case) and the restrictive Acadiens approach, based on a narrow and deferential interpretation of language rights. These two approaches are in many ways contradictory and represent two completely oppositional ways of interpreting language rights, or, to use Dale Gibson's analogy, they are "book-ends," "each being paired by a logical opposite."[135] The Supreme Court has thus laid down two distinctive language rights approaches for the lower courts to follow, rather than a single, unified and easily comprehensible approach which provides clear guidance for the courts. While the Beaulac approach represents the most recent precedent on this issue, as we will see in the following chapters, both Supreme Court approaches have had an important impact on the language rights jurisprudence of provincial courts which suggests that both poles of language rights interpretation remain viable in the jurisprudence. This fact has important consequences for official bilingualism.

NOTES

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[1] While some have preferred to refer to the Court's interpretive approach simply as "contradictory," [see Commissioner of Official Languages. Language Rights: 1999-2000. (Hull: Minister of Public Works Government Services, 2001), at 12], others have suggested that the Court varies between liberal and restrictive approaches in an arbitrary, uncertain and ambiguous way [see para. 2 of André Braën. "Judicial Interpretation of Language Rights in Canada and the Beaulac Case." English translation of "L'interprétation judiciare des droits linguistiques au Canada et l'affarie Beaulac." Review générale du droit. vol. 29, no. 4 (1998).], while still others have classified the Supreme Court's approach as "inconsistent" [see Magnet, 1995, at 136]. It should be noted, however, that many of these commentators who classify the Court's approach differently than I have for this examination, are also examining minority language education rights, which I am not.

[2] MacDonald v. City of Montréal, [1986] 1 S.C.R. 460.

[3] Ibid., 483-4.

[4] Ibid., 496.

[5] Ibid., 500-1.

[6] Ibid., 540

[7] Bilodeau v. Attorney General of Manitoba, [1986] 1 S.C.R. 449.

[8] Acadiens, 574-5.

[9] Ibid., 577.

[10] Ibid., 578.

[11] Ibid., 579.

[12] Ibid., 579-80.

[13] See Hunter v. Southam Inc., [1984] 2 S.C.R. 145, Law society of Upper Canada v. Skapinker, [1984] 1 S.C.R. 357, R. v. Big M Drug Mart Ltd., [1985] 1 S.C.R. 295, and R. v. Therens, [1985] 1 S.C.R. 613.

[14] Acadiens, 564.

[15] Ibid., 626.

[16] Ibid., 620-1.

[17] Ibid., 640.

[18] R. v. Mercure, [1988] 1. S.C.R. 234.

[19] Although bilingualizing provisions of the Northwest Territories Act were first legislated in 1877, they did not become s. 110 of the Act until 1886. The 1877 Act with its bilingualizing provisions was actually an amendment to the original Northwest Territories Act of 1875.

[20] Father Mercure was reportedly so sure of the violation of language rights in the province of Saskatchewan that he drove his car at reckless speeds up and down a street near a police station, hoping to be arrested in order to launch his case. See W. H. McConnell. William E. McIntyre: Paladin of the Common Law. (Montréal: McGill-Queen's University Press, 2000), 169.

[21] Not forcing Mercure to pay his parking ticket seemed appropriate in that he had died before the case had even reached the Supreme Court. The importance of the constitutional question caused the parties to continue to press the case in spite of its mootness.

[22] This case demonstrates the difference between legal victories and policy victories. While Mercure (posthumously) won his case in the legal realm, in the policy realm, the results of the case were clearly a loss, as the Court did not mandate that the government of Saskatchewan had to protect its francophone minority through s. 110.

[23] Mercure, 271.

[24] Ibid., 277.

[25] Magnet (1995), 242.

[26] Ibid., 273.

[27] Ibid., 193.

[28] Ibid., 242. Magnet is not alone in doubting the ability of the legislative process to develop linguistic equality and bilingualism in Canada. André Braën is similarly pessimistic when considering the prospect of the legislatures adequately advancing the rights of official language minorities. At para. 25, he writes: "the record on that score is not very persuasive and the political actors remain little inclined to define new rights in favour of official language minorities." Commenting on the political compromises doctrine in general, Braën writes (at para. 18): "in [my] opinion, the political compromise notion runs counter to the principle of equality that is supposed to prevail in the matter of language rights as it recognizes the current inequality on the one hand and relies exclusively on the political power to promote the rights of Canada's official language minorities on the other. A risky bet, indeed."

[29] Magnet (1995), 290.

[30] Braën, para. 22.

[31] Ibid., para. 20.

[32] See note 27, above.

[33] Braën., para. 20.

[34] Alan Riddell. "À la recherce du temps perdu: la Cour suprême et l'interprétation des droits linguistiques constitutionels dans les années 80." Les Cahiers de Droit. (Vol. 29 (1988)), 844.

[35] Ibid., 846. Similarly, Bastarache feels that all constitutions are the result of political compromises to some extent, as are several of the most important and fundamental rights of the *Charter*. He suggests, however, that this does not mean that a narrow interpretation of these rights is necessary. Michel Bastarache. "Language Rights in the Supreme Court of Canada: The Perspective of Chief Justice Dickson." Manitoba Law Review. Vol. 20 (1991), 401.

[36] Riddell, 848. The 'Patriation Reference' is Attorney General of Manitoba et. al. v. Attorney General of Canada et. al. [1981] 1 S.C.R. 753.

[37] Riddell, 847. Riddell also argues, at 849, that for the Court to rely on the legislatures alone to strengthen the rights of official language minorities is akin to the approach adopted by American courts in the segregation era.

[38] Riddell, 854.

[39] Ibid., 852.

[40] Bastarache (1991), 396.

[41] Ibid., 397, 398.

[42] Ibid., 398.

[43] Ibid., 400. In similar fashion, Luc Huppé questions if, under s. 52 of the *Constitution Act, 1982* (which is the constitutional supremacy clause), a constitutional provision (such as s. 16(1) of the *Charter*) can be denied its substantive effect. Luc Huppé. "Une intention ou une obligation?: Société des Acadiens c. Association of Parents." The Canadian Bar Review. Vol. 67 (1988), 132-133.

[44] Bastarache (1991), 400. Likewise, Riddell argues that the Acadiens approach "constituent un retour au XIXe siècle" in its outlook toward the development of language rights. Riddell, 841.

[45] Bastarache (1991). 401-402.

[46] Following the Supreme Court's decision, the governments of Saskatchewan and Alberta eliminated s. 110 and official provincial bilingualism from their provincial statute books. While these governments did grant some rights to their francophone minority communities (which afforded these communities more linguistic protection than they were accustomed to having), these protections were far less than what the communities were legally entitled to under s. 110 which they had hoped the Supreme Court would order their governments to provide.

[47] Ibid., 402. Magnet raises a similar point. He suggests that the Acadiens approach (and the *Meech Lake Accord* which followed the Acadiens approach to language rights) allowed the provinces to trample on the *Charter* and the rights of official language minorities. He feels that this is exactly what transpired in Alberta after the Mercure decision when Premier Don Getty removed the rights of Franco-Albertans. Joseph Eliot Magnet. "Language Rights: Canada's New Direction." University of New Brunswick Law Journal. Vol. 39 (1990), 11.

[48] Huppé, 140.

[49] Ibid., 137.

[50] Ibid.

[51] MacMillan, 90.

[52] Ibid. Huppé raises a similar point, arguing that it is curious for the Court to give a narrow interpretation to language rights when they are the sole rights to which ss. 1 and 33 of the *Charter* do not apply. The question, he implicitly asks, is how can the courts allow derogations of constitutional language rights when the legislatures are not at all free to do the same? (The Court ruled that the Québec government could not derogate from its language rights obligations under the *Charter* due to the s. 1 reasonable limits clause in Attorney General of Québec v. Québec Association of Protestant School Boards, [1984] 2 S.C.R. 66, at 78 and 85.

[53] MacMillan, 90.

[54] Re B.C. Motor Vehicle Act, [1985] 2 S.C.R. 486. This case too was rendered the year before the 1986 trilogy of language rights cases.

[55] Leslie Green and Denise Réaume. "Second Class Rights?: Principle and Compromise in the Charter." Dalhousie Law Journal. Vol. 13 (1990), no. 2, 587.

[56] Ibid., 574.

[57] They feel that this distinction threatens to parse the *Charter* into first- and second-class rights, the latter of which are likely to be robbed of their purpose and meaning (566). Jonathan L. Black-Branch makes a similar point (at 163) in arguing that the Court's "decision to approach language rights differently from other sets of rights renders all rights vulnerable."

[58] For other critiques see Mandel (155-168), Black-Branch (163-183), Campbell (36-58) and Patrick Monahan. (Politics and the Constitution: The Charter, Federalism and the Supreme Court of Canada. (Calgary: The Carswell Co. Ltd., 1997), 114-115). For a favourable comment on the approach, see Maxwell Yarden. ("The Relationship Between Human Rights and Language Rights." Revue Juridique Thémis. Vol. 28 (1994), 1104-1108).

[59] Attorney General of Québec v. Blaikie, [1979] 2 S.C.R. 1016 (Blaikie No. 1).

[60] Attorney General of Manitoba v. Forest, [1979] 2 S.C.R. 1032.

[61] Edwards v. Attorney-General for Canada, [1930] A.C. 124.

[62] Blaikie no. 1, 1030.

[63] Justice Bertha Wilson in Acadiens, at 625.

[64] Forest, 1036.

[65] Ibid., 1039.

[66] Ibid.

[67] Attorney General of Québec v. Blaikie, [1981] 1 S.C.R. 312 (Blaikie no. 2).

[68] The Court found that delegated legislation, legislative regulations, rules of court and regulations of the provincial bureaucracy were all captured by the bilingualizing provisions of s. 133. Blaikie no. 2, 317-333. Only municipalities and internal management regulations in the Québec public service were ruled to fall beyond the scope of s. 133. Blaikie no. 2, 322-4, 333.

[69] Reference re Manitoba Language Rights, [1985] 1 S.C.R. 721.

[70] For a brief review of the events of the post-Forest years in Manitoba, see Mandel at 394-396.

[71] It was later revealed the Chief Justice Brian Dickson was the author of the judgment, although his colleagues on the bench contributed a great deal of input and suggestions to the final draft (which was quite

different from Dickson's initial draft). Robert J. Sharpe and Kent Roach. Brian Dickson: A Judge's Journey. (Toronto: University of Toronto Press, 2003) , 418-420.
[72] Reference re Manitoba Language Rights, 744-5.
[73] Ibid., 747.
[74] Ibid., 758.
[75] Ibid., 766-7.
[76] Riddell, 836.
[77] Ibid., 837.
[78] Ibid., 836, 838.
[79] Magnet (1995), 134.
[80] Ibid., 241.
[81] Commissioner of Official Languages, (2001), 16.
[82] MacMillan, 89. Likewise, at 14, Magnet (1990) refers to that decision as a "high water mark."
[83] Braën, para. 8.
[84] Ibid., paras 2-8.
[85] Michel Bastarache (ed.). Language Rights in Canada. (Cowansville, Québec: Les Éditions Yvon Blais Inc., 1987), 129.
[86] Mandel., 153.
[87] Ibid.
[88] Ibid., 168.
[89] Green and Réaume, 593.
[90] See the Beaulac decision at para 22.
[91] Bastarache (1991), 404-5.
[92] Reference re Bill 30, An Act to amend the Education Act (Ont.) at 1176, Mahe v. Alberta, at 365 and Reference re *Public Schools Act* (Man.), s. 79(3), (4) and (7) at 852.
[93] Reference re Secession of Québec, [1998] 2 S.C.R. 217.
[94] Michel Doucet. Les droits linguistiques: Une nouvelle trilogie." University of New Brunswick Law Journal. Vol. 49 (2000), 5-6. See Reference re Secession of Québec at paras. 79-80.
[95] Jean Beaulac is an Aboriginal francophone who had moved to British Columbia from Québec. Beaulac was charged in 1988 for a 1981 murder. He had twice been convicted of the murder and had twice had his conviction overturned for procedural reasons. At every opportunity, he applied to have his trial conducted in French but was refused for various reasons by the BC courts. He was convicted a third time at trial, but appealed on the grounds that the unilingual English trial violated his language rights under s. 530 of the Criminal Code. It was this issue that the Supreme Court was called upon to decide. For a more detailed account of the facts of Jean Beaulac's various trials. Beaulac, paras. 7 to 11.
[96] Beaulac, para. 24.
[97] Ibid., para. 25.
[98] Ibid., para. 22.
[99] See Bastarache, (1987), 129 and 398, among others.
[100] Beaulac, para. 28.
[101] Ibid., para. 39.
[102] Ibid., para. 42.
[103] Ibid., para. 39.
[104] Ibid., para. 1.
[105] Ibid., para. 5.
[106] For more information on Bastarache, his career and his views on the abilities of language rights to mitigate social divisions, see Andrew Gray and Eleni Yiannakis "Language, Culture and Interpretation: An Interview with Mr. Justice Michel Bastarache." University of Toronto Faculty of Law Review. (Vol. 58 no. 1 (Winter 2000)), 72-83.
[107] For example, Jonathan L. Black-Branch, in his 2000 article "Constitutional Adjudication in Canada: Purposive or Political", mentions several times that the Supreme Court interprets language rights narrowly and not in a purposive manner (see pp. 172, 180, 182), apparently unaware of the Beaulac precedent released by the Supreme Court the previous year.

[108] This hypothesis seems unlikely however, given the attention paid to the Supreme Court's decision on the Reference re Secession of Québec the previous year. Indeed, it seems unlikely that language issues will ever be deemed to be unimportant in Canadian politics.
[109] See for example: Norma Greenway. "Supreme Court Orders New Trial for Man Convicted in B.C. Murder: Accused has the Right to Choose Language of Trial After Earlier Denial." National Post (May 21, 1999, A5). This article, which appeared in several Southam Newspapers across the country, devoted only one sentence to the rejection of the restrictive interpretation of language rights.
[110] M. v. H. [1999] 2 S.C.R. 3.
[111] Michel Venne, an editorialist with Le Devoir, was not one of the commentators who failed to notice the Beaulac case due to the M . v. H. case, as he attempted to illuminate the effects of Beaulac, which he felt had been 'jeté dans l'ombre' by M . v. H. Michel Venne. "Des tribunaux bilingues." Le Devoir. (May 26, 1999. A8).
[112] One source who has suggested this hypothesis is F.L. Morton, a political scientist and critic of judicial activism. Personal Correspondence with the Author.
[113] Braën, para 45.
[114] Ibid., para 36.
[115] Ibid., para 46.
[116] Ibid., para 49.
[117] Doucet, 10-11.
[118] Ibid., 12.
[119] Ibid., 11.
[120] Those cases are the Québec Secession Reference and Arsenault-Cameron v. Prince Edward Island, [2000] 1 S.C.R. 3.
[121] Doucet, 17.
[122] Ibid., 18.
[123] Ibid., 18.
[124] So pleased is he with the new Beaulac approach that he feels that we may now be in a position to think about the development and promotion of official language minority communities, rather than strictly their protection. Doucet, 18.
[125] Jules Richer (Canadian Press). "La Cour suprême met fin à tous les argument techniques: Les droits linguistiques doivent être intreprétés de façon généreuse." Le Droit. (May 21, 1999, 3). This syndicated article appeared in several other French language dailies including La Presse, Le Devoir and Le Soleil..
[126] Commissioner of Official Languages (2001), 15.
[127] Ibid., 17.
[128] Ibid., 19.
[129] Réaume, 598.
[130] Ibid., 597.
[131] Ibid.
[132] Ibid., 603.
[133] Ibid., 623.
[134] Another criticism of Beaulac came from the government of Québec. Because of the reasoning of the Beaulac decision, the criminal courts of the provinces were required to become institutionally bilingual. To the then Parti Québécois Attorney General of Québec (Linda Goupil), the increased use of English in the courts of Québec mandated by the Supreme Court undermined the ability of the Québec government to protect French in the province: "In Québec, this Beaulac judgment has the concrete effect of limiting Québecers' collective capacity to protect the flourishing of their language." Clark Campbell. "Québec Won't Appeal Ruling Guaranteeing English Court Rights: Minister Saw Little Chance of Winning." National Post. (June 3, 1999, A4).
[135] Dale Gibson. "The Real Laws of the Constitution." Alberta Law Review. (Vol. 28, no. 2), 364-365.

Chapter Three: Government Services, Municipalities and Legislative Language Rights Jurisprudence in Provincial Courts

Introduction and Categorization

While the intentions underlying the introduction of statutory and constitutional language rights are relatively clear, the ways these rights have been received by the Canadian judiciary are sometimes not consistent with these intentions. As we have seen, Canada's top court, the institution which is supposed to provide clarity and direction to Canadian law, has applied a varied and inconsistent interpretive approach to language rights, particularly in the sub-fields we are studying. This has led to confusion and uncertainty in the deciding of linguistic disputes in provincial courts which are themselves highly variable across Canadian federalism. The absence of such clear direction from the Supreme Court to the lower courts has potential to harm bilingualism and national unity. The Supreme Court's recent decision in Beaulac appears to be an attempt to provide greater clarity to the language rights issue. This latest precedent seems to strive to reinstate an interpretive approach which will advance the equality of French and English and reinforce national unity. However, after two significant changes of direction, the reception that the Court's new approach will receive in provincial courts, where the bulk of language rights cases are heard, is not a foregone conclusion. In the next two chapters, we will examine provincial court language rights interpretation since the release of Beaulac in the four sub-fields outlined previously. This analysis will allow us to determine how the provincial courts have responded to the Supreme Court's approaches and the effects of their language rights interpretation on the development of official bilingualism.

When undertaking a jurisprudential analysis of this nature, it is necessary to do so within a framework which will allow us to understand the policy consequences of the judicial decisions. While legal analysts are generally concerned principally with the precedential effects of a rights decision, political scientists are also interested in the larger effects that a judgment will have on public policy and administrative behaviour. Therefore, assessing the jurisprudence based on a liberal vs. restrictive categorization, in which the decisions are scrutinized based on how liberal or restrictive the interpretation may be, will be most useful. Analyzing language rights judgments in this way will allow

us to most clearly determine the policy consequences of the decision on the bilingualism regime. If the provincial courts tend to interpret language rights claims more liberally, the bilingualism regime will be advanced and developed to some extent, while if the courts interpret such rights more restrictively, the bilingualism regime will be set back to some extent. Such a liberal-restrictive categorization will therefore allow us to maintain a focus on the larger policy issues at play in the interpretation, rather than on the individual language rights claims and the precedents established in their interpretation. This approach will also allow us to see the extent to which provincial courts apply the liberal and restrictive precedents of the Supreme Court, the other main focus of this study.

While a framework of analysis based on the liberal or restrictive character of language rights interpretation is necessary, a simple liberal-restrictive dichotomy would be inappropriate. For a concept as potentially technical and complex as judicial interpretation, a more nuanced approach is necessary, one based on degrees of liberality and restrictiveness. Such an approach will allow us to best understand the amount of liberality or restrictiveness being exercised by the court in its decision, which will be more instructive about the policy effects that the decision will have. For example, a decision which is mildly liberal might simply provide an interpretation of the right which advances bilingualism slightly. On the other hand, a decision which is very liberal might involve a substantial policy change by the courts, such as the striking down of a policy or the reading-in of more liberal provisions into a law. The latter scenario has far greater policy consequences for the bilingualism regime than does the former and a framework which allows us to distinguish between the two degrees of liberality will allow us to see this important difference. While it is, of course, not possible to determine exactly the level of liberality or restrictiveness intended to be exercised by the judge, a categorization based on degrees of liberality and restrictiveness will take us much further in understanding the policy results of a decision than would a simple dichotomy.

While liberal decisions may share very little in common with restrictive decisions, a characteristic that both categories of decisions do share is that both types involve a degree of judicial creativity. Whether deciding a linguistic dispute liberally or restrictively, in both cases the court makes an interpretive choice and the opinion of the presiding

judge(s) comes into play in the interpretation of ambiguous provisions. In making either type of decision, the court is not simply applying a straightforward and specific law in a way that could have been foreseen without any choice or creativity on its part, but is choosing which precedents to apply and in which way to resolve the issues in dispute (either to advance or set back the bilingualism regime). However, there are some cases that differ from this model. In cases of this nature, the law is very specific and the way in which the dispute should be resolved is clear and can be foreseen. In such cases, the judge has very little room to be creative and is not able to choose how to decide the case or which precedents to apply because the nature of the provisions is sufficiently specific to eliminate the need for such creativity. For the purposes of this study, cases such as these will be referred to as 'Expected.' Expected decisions apply the law as is required by the specific provisions which entails either acceding to the language rights claim without strengthening or adding new rights to the bilingualism regime or denying the language rights claim (because it is unfounded according to the legal provisions, if such provisions exist at all) without undermining or taking away rights from the regime. These decisions have minimal policy effects and simply uphold the policy status quo.

In light of these important distinctions, I have created a categorization based on degrees of liberality and restrictiveness which includes allowances for 'Expected' decisions. This categorization will be applied to all of the language rights decisions rendered by provincial courts which we will examine in the next two chapters. The categorization is as follows:

- Highly Restrictive: where the court denies the language rights claim made before it by interpreting the language rights provisions in an extremely restrictive fashion. Often, interpretations of this nature are so restrictive that they are regressive or result in the emasculation or complete loss of existing language rights. Highly Restrictive decisions tend to undermine the bilingualism regime, which can set back the development of the scheme significantly. Such decisions also tend to rely upon either novel or overturned approaches to language rights interpretation which can result in a substantial departure from precedent (the Société des Acadiens v. Association of Parents[1] decision, in which the Supreme Court ruled that language rights could not be advanced by the courts in spite of its previous language rights interpretation and the

clear intentions of Parliament, was an example of an highly restrictive decision in which the development of bilingualism was set back).

- Somewhat Restrictive: where the court uses ambiguity or silence in the language rights provisions to rule against a language rights claim. In cases of this nature, the way in which the dispute is to be resolved is not clearly evident from the statutory or constitutional provisions and the court uses the 'grey area' or ambiguity to decide against granting the claim. In Somewhat Restrictive decisions, the bilingualism regime is set back in the province slightly, usually by the narrowing or weakening of existing rights.
- Expected: where the court judges the language rights claims in strict accordance with the legal provisions. In decisions of this nature, the dispute can easily be resolved by reference to the provisions (if such provisions exist) which provide an obvious guide as to how the dispute should be resolved. The manner in which such disputes are to be resolved is clear and can be foreseen because the provisions are specific and lack ambiguity. Such Expected decisions can be either for or against the language rights claimant and are simply resolved in the fashion that is clearly mandated by the legislature without the exercise of creativity on the part of the court. Decisions of this nature tend not to create or take away rights but maintain the policy arrangement as it existed prior to the dispute.
- Somewhat Liberal: where the court makes use of ambiguity or silence in the language rights provisions to rule in favour of a language rights claim. In cases of this nature, the way in which the dispute is to be resolved is not clear from the statutory or constitutional provisions and the court uses this 'grey area' or ambiguity to accede to the claim. In Somewhat Liberal decisions, the bilingualism regime is advanced (although only incrementally) usually by adding to or strengthening existing rights to a limited extent.
- Highly Liberal: where the court accepts the language rights claim made before it by interpreting the rights provisions in a very liberal fashion. Interpretations of this nature often result in the creation of entirely new language rights or in a significantly expanded scope for existing language rights. Highly Liberal decisions tend to strengthen the bilingualism regime considerably which can advance the frontiers of

the policy a great deal. Such interpretations also tend to be novel and can be a significant departure from precedent (the Beaulac decision, in which the Supreme Court ruled that the Criminal Code mandates institutional bilingualism in provincial criminal courts, is an example of a decision in which language rights were advanced significantly due to an highly liberal interpretation).[2]

As we have seen in the previous chapter, the interpretive approach established by the Supreme Court in Beaulac calls for the lower courts to make decisions which would fall into the final three categories when interpreting language rights (the expected and liberal categories). Beaulac clearly prohibits a restrictive approach to language rights interpretation. Therefore, it is against the approach outlined in that case that provincial court jurisprudence will be evaluated. As the Beaulac decision is clear and unequivocal in ordering lower courts to interpret language rights purposively and liberally, any decision which fails to do so will be deemed to fall under the restrictive categorizations. While these five categories will frame our analysis of lower court language rights interpretation, they are obviously not watertight compartments and the determination as to which category a given decision should fall under is clearly a subjective one.

Before moving to our analysis of the jurisprudence, a number of facts related to the issues we will be studying need to be kept in mind. Firstly, this study will examine both statutory and constitutional language rights provisions related to the provinces. In addition, some of the cases that will be analysed are not based on specific language *rights* provisions per se, but on language issues that relate very closely, or could relate, to the four sub-fields we are analysing; legal language rights, bilingual government services, legislative language rights and bilingualism in municipalities. For example, we will be looking at the case R. v. Rose,[3] in which an accused made a claim to a language right which simply did not exist in statute or in the constitution. In spite of the fact that such a right did not exist, the linguistic controversy at issue related very closely to legal language rights which made the inclusion of the case in this analysis warranted. As mentioned previously, linguistic disputes not included within, or related closely to, these four sub-fields will not be considered. As well, in our analysis of the jurisprudence, only final decisions will be examined (with one exception[4]). For example, if a case has been decided in a provincial appeal court, only the appeal court decision will be included in

our analysis while the decision of the trial court will not. I have tried to find the final decision for each case, up to May 1st, 2004. However, in some cases, appeals are, or may be, forthcoming. Finally, the relevant provisions of many of the statutes and constitutional documents described below are listed in the appendix.

Provincial Court Jurisprudence: Bilingualism in Municipalities

Baie d'Urfé (Ville) et. al. v. Québec (Attorney General) (2001)[5]

As discussed previously, bilingualism in municipalities is an important aspect of the bilingualism issue, as municipalities are the closest level of government to minority communities and have an important role to play in the survival of those communities. While a number of cases in this study relate to bilingualism in municipalities, the one that most directly concerns it is the case of Baie d'Urfé v. Québec. The dispute arose when the former PQ government of Québec sought to merge a number of municipalities in several urban regions of the province and to amend the Charter of the French Language (which was originally Bill 101). Originally under that law, any municipality in Québec whose majority spoke languages other than French would be classified as 'bilingual' and would not be subject to certain provisions of the law dealing with the language of local government administration. Bilingual municipalities were permitted to use both French and the other language of the municipality (generally English) in the provision of services, internal communications, public notices and other government works. With the changes introduced by the PQ, however, a municipality must now have a majority which speaks English to be considered bilingual.[6] In addition, while the bilingual municipalities that were to be merged into the new megacities were to become bilingual 'boroughs' of the new cities, boroughs were to have considerably less power and jurisdiction in the merged city than did the former free-standing municipalities.[7]

These legislative changes were met with hostility by many in Québec. Particularly outraged was the anglophone minority in the province which felt that the changes undermined the rights its municipalities had long enjoyed which threatened its existence as a community. It felt that by making bilingual status more difficult to attain (and maintain) and by reducing the role and power of many of the bilingual cities which had existed previously, the new legislation jeopardized the sustenance of Québec's anglophone community and made the vitality of the anglophone culture and language in

Québec more difficult to ensure.[8] With the provincial government unwilling to back down, many members of the anglophone community joined with a coalition of other Quebecers opposed to the legislation and launched a lawsuit seeking to have the legislation struck down, in part on the grounds that it violated the 'protection of minorities' principle from the Secession Reference. When the Superior Court of Québec dismissed their claim, the group appealed to the Québec Court of Appeal.[9]

In upholding the Superior Court's decision, the Court of Appeal refused to accept the argument based on the 'protection of minorities' principle. The principle, it stated, could not be interpreted to confer to anglophone Quebecers a right to bilingual municipalities in the form offered before the changes to the law were made.[10] The principle could only be invoked in circumstances in which the constitution is silent (such as on the secession of Québec or the closing of a minority hospital) and could not be relied upon to override the written text of the constitution, such as s. 92(8) of the Constitution Act, 1867 which gives plenary jurisdiction over municipalities to provincial legislatures.[11] The court ruled that to grant the request of the appellants to maintain the municipal structures as they had existed previously due to the 'protection of minorities' would put some municipalities (namely, those who play a role in the maintenance of the anglophone minority) beyond the scope of provincial legislative alteration which would contravene s. 92(8).[12]

Having ruled that the Secession Reference principles did not apply in the case at bar, the court turned to an analysis of the language rights in the written constitutional text. Quoting Blaikie No. 2, it found that s. 133 rights do not apply to municipalities in Québec,[13] nor did any other constitutional language rights. In addition, in suggesting that it was not at liberty to expand upon the constitutional language rights scheme, the court relied upon the MacDonald precedent. It quoted passages from the decision which suggested that the language rights in the written constitution constitute a complete code to which only the legislatures, but not the courts, are free to add.[14] In response to the argument that the Beaulac case had overturned this precedent, the court stated:

> Les appelants se méprennent lorsqu'ils prétendent que la Cour suprême nous incite maintenant à mettre de côté les principes précédemment exposés. La Cour suprême, dans l'arrêt Beaulac, énonce que ce sont les droits linguistiques expressément prévus qui doivent recevoir une interprétation

> large et libérale. Il faut par conséquent replacer la décision Beaulac dans le contexte où la Cour devait se prononcer sur l'étendue de droits linguistiques spécifiquement prévus par l'article 530 du Code criminel.
> ...
> En concluant que les droits linguistiques doivent être interprétés de façon généreuse et compatible avec leur objet, la Cour suprême n'a pas pour autant mis à l'écart le principe qu'il n'appartenait pas aux tribunaux d'ajouter au compromis politique sur les droits linguistiques.[15]

In making this bold and, in my opinion, highly questionable distinction, the court was able to argue that the restrained approach to the interpretation of language rights had not been completely overturned by Beaulac and that it was obligated to interpret the appellants' language rights claim in a narrow fashion.

At the hearing, the court was also asked to consider the 'ratchet principle,' where statutory language rights are said to enjoy constitutional protection under s. 16(3). However, the court's judgment did not address this issue directly, arguing that no diminution of the existing language rights had resulted from the legislative changes.[16] With the failure of all of these language rights claims, the court denied the appellants' motion to strike down the new municipalities laws, and the mergers proceeded as planned.[17] In spite of the judgment's seeming contradiction to the interpretive approach outlined in Beaulac, the Supreme Court denied the appellants leave to appeal.[18]

This case should be categorized as ***Highly Restrictive***. The court's reliance on principles characteristic of the Acadiens interpretive approach was an extremely restrictive interpretation of the language rights claim which could have the effect of reviving that discredited and overturned approach in Québec.[19] The effect of the Beaulac decision was to strike from Canadian constitutional law the approach which holds that the courts are not free to add to the political compromises underlying language rights and must therefore interpret such rights restrictively. The Québec court's argument that the Acadiens approach had not been overturned and reliance on it to maintain a restrictive interpretation of linguistic disputes is, in my view, highly questionable jurisprudence. As well, in reaching its decision, the court not only permitted the emasculation of bilingualism in Québec but may also have contributed to it itself by resuscitating a narrow interpretive approach to language rights. This result could have important consequences for the interpretation of language rights in that province which could set

back the development of bilingualism in the province significantly. What is perhaps more shocking than the judgment itself is the fact that the Supreme Court allowed it to stand by not granting the appellants leave to appeal.

Bilingual Government Services

R. v. Cormier (1999)[20]

While rights related to bilingual government services are not the most commonly litigated of our four sub-fields of language rights, some very important decisions have been rendered in this area. While one of the most important cases that we are studying (without question the most widely known) concerned the Montfort hospital in eastern Ontario, the first decision in this sub-field after Beaulac related to the services provided by the police.

The Cormier case concerned the language that should be used by a police officer who was providing services (in this case, communicating) to a motorist in New Brunswick.[21] During a routine traffic stop, with the conversation taking place entirely in English, the officer discovered that the accused's automobile registration had expired. While the accused understood English well and had not asked for the officer to communicate to him in French, before the Provincial Court of New Brunswick, the accused argued that his language rights had been violated by the officer's failure to actively inquire about in which language the accused wished to be served.[22]

The provincial court ruled against the accused. While it argued that police officers are obligated in New Brunswick to provide those with whom they communicate 'a reasonable and significant choice' of official language, it relied upon New Brunswick Court of Appeal jurisprudence which indicates that it is not necessary to hold officers to a strict duty to offer such a choice.[23] The court also ruled that language rights should be interpreted with restraint due to the fact that they are based on political compromises.[24] It argued that the accused's failure to indicate that he wished to be dealt with in French as well as his comprehension of English (i.e. his sufficient understanding of the reasons for his being stopped and charged) meant that his language rights claim could not be accepted.[25] Accordingly, the court ruled that that no language rights violation had occurred and convicted the accused.

This case should be categorized as ***Highly Restrictive***. In reaching its conclusion, the provincial court relied on a number of tenets of the Acadiens interpretive approach to language rights which had been overturned earlier that year in Beaulac. The court's ruling that language rights must be interpreted restrictively due to the political compromises doctrine and its argument that the accused's language rights need not be respected due to his understanding of English are both directly contradictory to the Beaulac decision.[26] In failing to apply Beaulac and in applying the Acadiens approach, the court had clearly provided a very restrictive interpretation. The decision ignored the advances for language rights that the Supreme Court had provided which undermined the advancement of bilingualism in New Brunswick significantly. While it is possible that the provincial court judge was unaware of the Beaulac decision which had been decided just two months previously, ignorance is no excuse for failing to apply binding precedent in the common law and the court's application of such an extremely restrictive interpretation appears to be completely unconstitutional. In spite of the failure of the court to apply the Beaulac precedent, I am not aware of any appeal of this ruling.

Dehenne v. Dehenne (1999)[27]

The Dehenne case originated from civil proceedings launched to determine who would manage the financial affairs of a person who had been incapacitated by a stroke. When one of the parties wrote a letter in French to the Public Guardian and Trustee of Ontario seeking an evaluation of the incapacitated person, the Trustee responded in English. Similarly, the Trustee sent a representative to evaluate the condition of the incapacitated individual who was also unilingually English (the evaluator had to use a translator in their assessment). When the Trustee sought to collect the fees it was owed for its services, its use of English was protested in court.[28]

The judge at the Ontario Superior Court was unwilling to accede to the Trustee's demand for its fees. The judge reasoned that the Trustee, must make every effort to implement and respect the language rights of the Ontario French Language Services Act (FLSA) (which gives franco-Ontarians certain rights to communicate with certain government offices in French, among other things), regardless of the administrative inconvenience that doing so entails for the agency.[29] The judge stipulated that according to the FLSA, the agency must be able to offer services to clients in both English and

French and that its failure to do so in this case violated both the letter and the spirit of the Act.[30] Using a tone which was highly critical of the government throughout, the judge warned: "The intervention of the court should not be necessary to reinforce this right."[31] In addition, on the issue of the failure of the Trustee to provide a French speaking evaluator, the judge ruled that French is one of the official languages of the courts of Ontario and that the agency must employ a sufficient number of evaluators who speak French in order to be capable of offering its services in both French and English.[32] Accordingly, the Trustee was said to be in violation of the litigants' language rights and was denied its usual evaluation fee.

This decision should be categorized as ***Expected***. The Public Trustee was clearly in violation of its linguistic obligations under the FLSA and the court simply affirmed that fact in rendering its decision. The trial judge upheld the law and provided an appropriate solution to the agency's failure to execute its linguistic obligations. This decision did not advance or undermine the bilingualism regime in the province in any way and simply provided a just remedy for the government's failure.

Lalonde v. Ontario (Commission de restructuration des services de santé) (2001)[33]

In the late 1990s, the Ontario government, under the Mike Harris-led Conservative party, made a number of significant cutbacks to provincial services, including health care. As a part of these cuts, an order was made to close the Montfort hospital. This hospital was an entirely French language institution which also served as a training facility for French speaking medical students. With the government's order, the French language services previously fully available at the Montfort were to be received in a bilingual environment at a different hospital. After a significant public outcry by eastern Ontario's francophone community and a major campaign to convince the government of the cultural value of the institution to that community, the order was amended to allow for the hospital to remain in operation, albeit at a substantially reduced capacity. Unable to persuade the government of the necessity of maintaining the hospital at full capacity, a number of franco-Ontarians launched a lawsuit against the order on a number of grounds, including a claim that the order violated the 'protection of minorities' principle expounded in the Secession Reference. The trial court agreed with the Montfort group

and quashed the government's order. This decision was appealed by the Ontario government.[34]

At the Court of Appeal, the Ontario government argued that the FLSA provides a number of rights to franco-Ontarians but does not protect against the closure of a French hospital.[35] Countering the claims of the Montfort group, it argued that the constitution contains an exhaustive list of language rights and that the Secession Reference 'minority protection' principle cannot be applied in the current case without creating a new free-standing language right.[36] In addition, it asserted that it had provided a suitable alternative to the Montfort's services by offering bilingual services at a different hospital. The Court of Appeal disagreed with all of these arguments. Responding to the latter claim, it said: "Ontario's submission that health care services to the francophone population would not be reduced by the implementation of the [government's] directions ignores reality.... Good intentions are not a substitute for fact."[37] It ruled that the trial court was correct in finding that the government's order would seriously jeopardize the quality of health services to Ontario's francophone population.[38]

The appeal court also ruled on the argument that the FLSA does not protect French language health services at the Montfort. The FLSA, (which, the court ruled, is an example of legislation intended to pursue linguistic equality under s. 16(3) of the *Charter*[39]), guarantees certain government services to francophones in certain regions of the province (which includes the Montfort hospital according to the definitions and schedule of the Act[40]). To the court, which interpreted the language rights contained in the legislation purposively as mandated by Beaulac, the Act was created for the purposes of assuring the preservation of Ontario's francophone minority community. The government's order, it ruled, was a clear violation of the purposes of the Act and had to be struck down.[41] However, the court refused to agree with the argument of several litigants that legislation enacted pursuant to s. 16(3) gained constitutional protection by that section and therefore could not be repealed or weakened without violating the constitution (the so-called 'ratchet principle'). It ruled that s. 16(3) was intended only to shield legislation enacted to advance bilingualism from constitutional attack under the equality rights of s. 15 of the *Charter* and could not be said to protect such legislation from statutory repeal.[42]

On the issue of the 'protection of minorities' principle, while the court disagreed that the principle could be used to strike down actual legislation, it felt that it could be used to quash administrative orders like that impugned in the case at bar.[43] It ruled that because of the government's failure to consider the Montfort's cultural value to the franco-Ontarian community and its implementing of an order which undermined an institution that is key to that community's survival, it violated the constitutional principle of the 'protection of minorities' by which it was bound. The court argued: "While the [government] is entitled to deference, deference does not protect decisions...that impinge on fundamental Canadian constitutional values without offering any justification."[44] For this reason too then, the court rejected the government's appeal and confirmed the decision of the lower court. The Ontario government elected not to appeal the decision.

This decision should be categorized as ***Highly Liberal***. By relying on the foundational principle of the 'protection of minorities,' the court used a novel interpretive approach to assist the franco-Ontarians which can (arguably) be said to have provided additional language rights protections for that minority community against hostile governments such as the Harris government of the late 1990s. In employing this approach, as well as by interpreting the FLSA purposively, the court made it increasingly difficult for the Ontario government to scale back the services that it offers to francophones by providing a new defence against such actions, a decision which strengthens the bilingualism regime in the province significantly. The court also set a precedent which further entrenched language rights in the province and made it more difficult for such language rights to be restricted and trampled upon. This extremely liberal interpretation strengthened the bilingualism regime in the province substantially which makes it all the more likely that franco-Ontarians will be able to successfully defend their rights before the courts in future circumstances where their rights are threatened.

R v. Doucet (2003)[45]

Like the Cormier case, this recent decision from the Nova Scotia Supreme Court related to the scope of bilingual government services given by police officers. The facts of the case concerned another traffic infraction, in this case, a speeding ticket administered by an RCMP officer in a rural part of the province. In the brief encounter

between the officer and the accused, the officer spoke only English while the accused responded solely in French. At no time did the accused explicitly ask to be served in French. At trial, the accused, who was represented by Roger Bilodeau (no stranger to language rights claims related to traffic tickets after losing his case in the 1986 trilogy), alleged that the RCMP, as a federal agency, was obliged to offer services bilingually under s. 20 of the *Charter* even when under contract to an officially unilingual province. The provincial court judge disagreed with the accused's claim and convicted him of speeding. The accused appealed.[46]

At the Supreme Court of Nova Scotia, the accused fared somewhat better. To the judge, the RCMP does not lose its status as a federal agency when it does police work in any of the provinces.[47] The judge argued that the agency's entering into a contract with one of the provinces changes nothing about the RCMP Act which clearly makes it a federal institution and therefore subject to s. 20 of *Charter*.[48] To rule otherwise, the judge argued, would allow federal authorities to skirt their language rights obligations, a state of affairs which would not be permitted by Beaulac.[49] Indeed, the judge argued that case law confirms that it is not permissible for federal agencies to avoid their language rights obligations by delegating their responsibilities, which suggests that federal agencies would not be permitted to do the same when provincial powers are delegated to them.[50] In addition, the judge argued that to rule that the language rights did not apply to the RCMP when executing provincial duties would equate to allowing someone to have language rights when stopped for a federal offence but not for a provincial one.[51]

While the court expanded the scope of s. 20 rights in this way, it also limited them later in the same decision. The judge ruled that the officer was under no obligation to provide an active offer of services in French to the accused and that simply being willing to arrange for such services if requested was sufficient.[52] To the judge, the person requiring the minority language services bears the onus of signalling their request for those services, which the accused had not done in this case.[53] Perhaps more importantly, for federal services to be offered under s. 20, a significant demand must exist for the services to be made available. The judge ruled that the accused had failed to convince the court that there was a significant demand for French services in the area. Therefore, while the court ruled that the trial court had erred in ruling that there was no language

rights violation, it did uphold the lower court's ruling (and its conviction of the accused) that s. 20 rights should not have applied in the case at bar.

The court's reasons for judgment contain hallmarks of both highly liberal and somewhat restrictive decisions. In light of this fact, it should be judged according to its precedential effect which I view to be ***Somewhat Liberal***. The court's application of federally applicable language rights to a power clearly within provincial jurisdiction ('the Administration of Justice in the Province' which falls under s. 92(14) of the *Constitution Act, 1867*.) is highly liberal. In doing so, it created new language rights in the province of Nova Scotia with a novel interpretation which advances the province's bilingualism regime greatly. However, there was a degree of ambiguity as to whether the language rights should apply in the particular situation at issue and in interpreting this situation, the court decided against the claimant. The court used this ambiguity to set a very high threshold for activating the s. 20 rights which was a somewhat restrictive way of interpreting the dispute. The precedent set by the decision is that s. 20 rights can apply in provincial jurisdictions policed by the RCMP, although only in cases where a significant demand exists (such places, like rural New Brunswick for example, are likely to already be served bilingually). In that way, bilingualism has been advanced somewhat, as those rare places which do not already receive bilingual provincial government services but which can be considered to make a significant demand for them will have gained that right. This is a small gain which will apply only in exceptional cases but it is an incremental advance of bilingualism.

Legislative Language Rights

Charlebois v. Mowat and Moncton (City) (2001)[54]

While rights related to legislative bilingualism are among the commonest and oldest bilingualism rights, they have been among the least litigated since the Beaulac precedent, perhaps due to their longstanding status in the Canadian constitution. One of the rare legislative bilingualism cases which did arise related to the scope of legislative bilingualism in New Brunswick (which also related to bilingualism in municipalities).

Mario Charlebois was charged with a building code violation in the city of Moncton, pursuant to a civic by-law which was enacted in English (though a French translation of the law existed.) Charlebois alleged that because it was enacted

unilingually, the by-law and orders made pursuant to it were invalid under s. 18(2) of the *Charter* which mandates legislative bilingualism in New Brunswick.[55] While that section mandates bilingualism for the 'statutes of the legislature' of New Brunswick, Charlebois suggested that a liberal reading of this language right would extend the provision to municipal legislation. If his claim succeeded, it would render all unilingually enacted municipal by-laws in the province null. The trial judge dismissed Charlebois' motion, pointing to the Supreme Court's Blaikie no. 2 decision which indicated that municipalities are not considered under s. 133 (a provision after which s. 18(2) was modeled). Charlebois appealed the ruling, arguing that Beaulac mandates that 'statutes of the legislature' be construed purposively, for the preservation of linguistic minorities.[56]

The New Brunswick Court of Appeal considered a number of factors in reaching its decision. Firstly, it concluded that the pre-*Charter* Blaikie decisions should be "viewed with prudence" and are not necessarily binding in the case at bar as the rights entrenched in the *Charter* were intended to override the status quo, rather than simply affirm it.[57] It also ruled that the language rights contained in the *Charter* should be construed remedially and for the protection and flourishing of official language minority cultures.[58] After quoting the Beaulac decision extensively, the court decided that the equality mandated by the *Charter* must be viewed as substantive which entails obligations for the state, rather than simply as minimal linguistic guarantees.[59] Accordingly, the court ruled that to exclude municipal by-laws from a definition of 'statutes of the legislature' would be incompatible with the development and preservation of linguistic minorities, which was ordered by the Supreme Court in Beaulac and the Secession Reference.[60] Therefore, the court ruled that a liberal and purposive interpretation of the phrase 'statutes…of the legislature,' one which provides substantive equality, would include municipal by-laws.[61]

With this ruling, the court struck down all unilingually enacted municipal by-laws in the province, though similar to the Manitoba Language Rights Reference, it provided one year of temporary validity to the by-laws.[62] However, the court did soften the blow to some degree. While it declared that the government of New Brunswick had a responsibility to ensure that its municipalities became legislatively bilingual, it provided it and the municipalities themselves the power to determine how exactly this legislative bilingualism would be applied.[63] It even raised the possibility of some municipalities

avoiding the bilingualizing provisions of the *Charter*, as would be possible were the province to establish 'where numbers warrant' criteria under s. 1 of the *Charter*.[64] It appeared, however, that the unilingual by-law of the city of Moncton ran afoul of the *Charter*, though it would remain valid temporarily. The New Brunswick government opted not to appeal this ruling.[65]

This decision should be categorized as ***Highly Liberal***. In striking down all unilingually enacted municipal by-laws and ruling that s. 18(2) of the *Charter* applies to municipal councils, the court interpreted the language rights of the *Charter* in an extremely liberal fashion. It interpreted these rights as not simply a constitutional minimum, but as substantive rights intended to provide meaningful equality. The decision created a new set of rights in the province (municipal legislative bilingualism) which advanced the scope of bilingualism a great deal. The court also set a precedent that expanded language rights in the province substantially which can be applied in the future to strengthen bilingualism further. It is thus a very liberal decision which advanced the development of bilingualism in the province considerably. In spite of this impressive victory before the Court of Appeal, however, this would not be Mario Charlebois' last appearance before the courts.

Non-Legal Language Rights Provisions

As the above analysis indicates, the interpretation of provincial courts has varied highly in the sub-fields of municipalities, provincial government services and legislative language rights. However, these three sub-fields represent only the tip of the language rights jurisprudential iceberg, as the vast majority of post-Beaulac language rights cases have taken place in the sub-field of legal language rights. It is to an analysis of that jurisprudence that we now turn.

NOTES

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[1] Société des Acadiens du Nouveau-Brunswick Inc. and the Association des conseillers scolaires francophones du Nouveau-Brunswick v. Association of Parents for Fairness in Education, Grand Falls District 50 Branch. [1986] 1 S.C.R. 549.

[2] It should be noted that in cases related to rights in the *Canadian Charter of Rights and Freedoms* (such as legal language rights in New Brunswick under s. 19(2)), the issue can sometimes be decided with the use of judicial remedies in accordance with s. 24(1) of the *Charter*.

[3] R. v. Rose (2003), 43 Motor Vehicle Reports (4th) 35.

[4] This exception is the Peters case, which was the subject of a brief judgment of the Supreme Court. This exceptional judgment will not be factored into our tabulation of the results of language rights jurisprudence since 1999, due to its minor significance.

[5] Baie d'Urfé (Ville) et. al. v. Québec (Attorney General), [2001] J.Q. No. 4821.
[6] Under s. 29.1 of the Charter of the French Language.
[7] This summary of the facts of the case are derived from a summary of the case appearing in Canada. Commissioner of Official Languages. Language Rights: 2001-2002. (Hull: Minister of Public Works Government Services, 2003), at 30-37.
[8] Ibid., 30-31.
[9] Ibid., 33.
[10] Baie d'Urfé v. Québec, para. 94.
[11] Ibid., para. 93.
[12] Ibid., para 122. The Court reasoned: "si la prétention des appelantes était retenue, elle mettrait à l'abri de l'exercice du pouvoir de l'article 92(8) un certain nombre de municipalités dont on pourrait établir qu'elles jouent un rôle important pour la protection d'une minorité quelle qu'elle soit."
[13] Ibid., para. 137.
[14] Ibid., para. 136.
[15] Ibid, paras. 140 and 143.
[16] The court argued that because the formerly bilingual municipalities had maintained their bilingual status as boroughs, no elimination or emasculation of the rights of those municipalities had occurred. It reached this conclusion in spite of the fact that powers and jurisdiction of the new boroughs had been undermined considerably. Commissioner of Official Languages (2003), 36-37. While not an explicit repudiation of the 'ratchet principle' the court's curious refusal to even grant that the new boroughs had a more limited scope suggests that it was not persuaded by the any argument that s. 16(3) of the *Charter* should protect statutory language rights gains.
[17] However, due to the anger many Quebecers (francophones and anglophones) felt about the merger issue, the Québec Liberal Party promised in the 2003 election campaign to allow citizens of merged communities to vote in a referendum to determine whether to de-merge the new megacities. After defeating the PQ government (thanks in part to its opposition to the merger issue), the Québec government held the promised referendums on June 20, 2004. Numerous municipalities voted successfully to de-merge, including several predominantly anglophone municipalities in the Montréal area (such as Baie d'Urfé itself). In this instance, a loss in the legal realm was followed by a victory in the political realm. Nelson Wyatt. "Urban Quebec 'Blasted Apart.'" The Ottawa Citizen. June 22, 2004, A3.
[18] Commissioner of Official Languages (2003), 37.
[19] In my mind, the Québec Court of Appeal's reliance on the Acadiens approach is much more serious than is the reliance on the approach by more junior level courts (such as the New Brunswick Provincial Court in the case at which we are about to look. As the top court in Québec and one of the most senior courts in the country, Québec Court of Appeal precedents carry considerable weight, which, in my opinion, makes its decision to rely on the Acadiens approach all the more dangerous for the development of official bilingualism.
[20] R. v. Cormier, (New Brunswick Provincial Court. July 21, 1999. Unreported).
[21] As this case is unreported, the summary of the facts, as well as information on the judgment, are all derived from a summary of the case appearing in Commissioner of Official Languages (2001), at 62-63.
[22] Ibid., 62.
[23] Ibid.
[24] Ibid., 63.
[25] Ibid., 62-63. The officer testified that had he detected any difficulty understanding the conversation on the part of the accused, he would have sought the assistance of a bilingual officer to serve the accused in French.
[26] Beaulac at paras. 25 and 45-47, respectively.
[27] Dehenne v. Dehenne), (1999) 47 O.R. 140.
[28] This summary of the facts of the case is drawn from paras. 1 and 11 of the judgment.
[29] Dehenne, paras. 5 and 9.
[30] Ibid., paras. 10 and 13.
[31] Ibid., para. 11.
[32] Ibid., para. 15. The evaluation done by the Trustee of the incapacitated individual's condition was done pursuant to the legal dispute between the litigants. That government service is administered for use in legal disputes, which brought the issue of the official languages of the courts of Ontario to play. Under s. 125

of the Ontario Courts of Justice Act, both French and English are designated as the official languages of Ontario courts.

[33] Lalonde v. Ontario (Commissions de restructuration des services de santé), (2001) 56 O.R. 505.

[34] This summary of the facts of the case is drawn from paras. 1-55 of the judgment.

[35] Lalonde, para. 160.

[36] Ibid, paras. 2 and 115.

[37] Ibid., para. 61.

[38] Ibid., paras. 62-76.

[39] Ibid., para. 129.

[40] Ibid., para. 147. The definitions, which make clear that institutions such as the Montfort would be included are listed under s. 1 of the Act.

[41] Ibid., para. 169.

[42] Ibid., para. 92.

[43] Ibid., para. 124.

[44] Ibid., para. 184.

[45] R v. Doucet, [2003] N.S.J. No. 516.

[46] This summary of the facts of the case is drawn from paras. 1-28 of the judgment.

[47] Doucet, para. 31.

[48] Ibid., para. 32.

[49] Ibid.

[50] Ibid., para. 33.

[51] Ibid. While this scenario appears to be ridiculous and unacceptable to the court, in my opinion, its ruling has the effect of providing those stopped by RCMP officers to have language rights under s. 20, while those stopped by civic police officers (like the Halifax Regional Police department, for example) to have no such rights. Such a distinction (which would be based almost entirely on an urban-rural bases) is, I would suggest, equally unreasonable.

[52] Ibid., para. 36.

[53] Ibid., para. 41.

[54] Charlebois v. Mowat and Moncton (City), (2001) 242 N.B.R. (2d) 259.

[55] As stated at para. 48 of the decision, the Supreme Court held in Blaikie no. 1 that the phrase 'printed and published' in s. 133 also includes the enacting of laws in both languages, which would apply to the case at bar as well.

[56] This summary of the facts of the case is drawn from paras. 1-17 of the judgment.

[57] Charlebois v. Mowat and Moncton, paras 44-7.

[58] Ibid., paras. 53-54.

[59] Ibid., paras. 70-76 and 93.

[60] Ibid., paras. 86 and 95.

[61] Ibid., para. 96.

[62] Ibid., para. 129.

[63] Ibid., paras 111 and 127.

[64] Ibid., para. 127. Section 1 of the *Charter*, the reasonable limitations clause, allows for *Charter* rights to be reasonably limited in some circumstances. Applied to the case at bar, a town which is 95% unilingual might be justified in limiting legislative bilingualism to some degree.

[65] Commissioner of Official Languages (2003), 29.

Chapter Four: Legal Language Rights Jurisprudence in Provincial Courts

Legal Language Rights

The sub-field in which the majority of language rights litigation has taken place since the Beaulac decision is the field of legal language rights. Litigation in this field has included claims based on s. 530 of the Criminal Code, s. 133 of the *Constitution Act, 1867*, language rights in the *Charter* (particularly those which apply to New Brunswick) and provincial statutory rights. It appears that it is this sub-field in which the development of bilingualism has been most at stake in the last five years. In this chapter, the cases will be divided according to the categorization of the decisions.

Highly Restrictive

R. v. Peters (1999)[1]

In spite of Beaulac's overt rejection of the Acadiens approach and explicit orders to interpret language rights liberally 'in all cases,' some courts continued to rely upon the restrictive tenets of the Acadiens approach. One case in which this can be seen is Peters which concerned (among other things) the language of testimony given by a witness in a trial in Québec. The accused was charged and convicted of conspiracy in a lower court after attempting to facilitate the importing of cocaine into Canada. One of the key elements of the case against the accused was a statement he had made in English to a police officer (while serving as an informant). At trial, the defence intended to cross-examine the francophone officer in English in order to determine the validity of his claim to be able to properly comprehend the incriminating statement made by the accused. As the Crown's case, in many ways, rested on the statement, the officer's ability to understand it was vital. However, pointing to s. 133 language rights, the trial judge refused to force the witness to testify in English. After being convicted and sentenced to nine years in jail, the accused appealed this (and many other) aspect(s) of the decision.[2]

The Québec Court of Appeal sided with the accused. It ruled that the trial judge erred in not allowing the witness to be cross-examined in English because the issue in this instance was not the language rights of the officer but his ability to comprehend English.[3] It quoted from several legal sources which indicated that the full answer and defence of an accused requires a full cross examination of witnesses and that this can take the form

of questioning the credibility of a witness.[4] The court argued that if the defence has a right to test the eyesight of a witness who had seen something, it should also have the right to question the linguistic abilities of a witness who claims to have interpreted something in his/her second language. Accordingly, the court ordered a new trial in which the witness could be cross-examined in English.

This case should be categorized as ***Highly Restrictive***. Section 133 of the Constitution Act, 1867 clearly states that parties to a "Process in or issuing from...any of the Courts of Quebec" "may" use either English or French (emphasis added). This provides parties to court proceedings in Québec the choice of which language to use. For the court to force someone to use an official language they wish not to use appears to be unconstitutional. In this case, it resulted in the complete withdrawal of the officer's s. 133 rights. For the court to rule that these rights do not apply to an officer whose linguistic skills are questioned is an extremely restrictive way to interpret these rights, which could result in the emasculation of the language rights of witnesses in Québec courts and a significant undermining of the bilingualism scheme in the province. If the result of this decision is applied to other cases in which litigants are looking for ways to undermine the language rights of others, the entire bilingualism scheme established in s. 133 could be vulnerable. This case serves as a good example of an incident in which a narrow reading of the language rights (i.e. the application of principles characteristic of the Acadiens approach) was used by the courts to justify its concerns for the administration of justice.

Unlike all of the other provincial language rights cases we are studying, the Supreme Court of Canada granted leave for the Crown to appeal this decision.[5] The Supreme Court's judgment on the case represents its sole foray into a language rights issue (in the four sub-fields with which we are concerned) since the Beaulac case. In a brief four paragraph decision (only one paragraph of which dealt directly with the language issue),[6] the Supreme Court panel upheld the ruling of the Québec Court of Appeal allowing the defence to cross-examine the witness in English and dismissed the Crown's appeal.[7] This decision was a brief and relatively insignificant oral judgment which was rendered by only a seven member panel and which simply affirmed an earlier decision (and therefore cannot be said to be a substantial departure from the Beaulac

approach). However, it does provide evidence (in addition to its refusal to grant leave to appeal to several appellants of restrictive decisions) that the Supreme Court's commitment to its Beaulac approach is not as firm as it could be. Why the Supreme Court would make the judgment deciding this case so short and insignificant and why it would not enforce its Beaulac approach by ruling that the language rights of the witness must be respected according to the purposes of the constitution are difficult to determine. I suspect that the low profile accorded this case owes more to the Supreme Court wishing to avoid getting embroiled in another potentially controversial linguistic dispute than to any legal reason.[8] Ironically, the majority's reasons in this case were delivered by none other than Justice Michel Bastarache.

Morand v. Québec (Attorney General) (2000)[9]

Another case that related to the effects of s. 133 in Québec was the Morand case which concerned the language of judicial decisions in that province. The initiator of the proceedings, Morand, sought a court ruling which would force the judiciary in Québec to be more bilingual. In particular Morand sought a declaratory judgment from the Québec Court of Appeal stating that all court judgments in the province must be rendered bilingually under s. 133 of the *Constitution Act, 1867* and that those which are rendered unilingually are of no force or effect.[10]

In its decision on the case, the Québec Court of Appeal rejected Morand's claim. It quoted case law from 1994 which stated that there is no discrimination in the release of judicial decisions in the language of the judge's choice because the right to do so is guaranteed by s. 133.[11] The court reiterated the sentiment of the earlier decision that the language of a judgment is entirely at the discretion of the judge.[12] Interestingly, it also quoted a passage from the earlier decision which stated that to demand that translations of judgments be mandatory would modify the political compromises underlying the constitution.[13] Furthermore, the court stated, such a translation would be unnecessary as translations are offered to parties to disputes in Québec (though not others) by the provincial government.[14] The Court therefore dismissed the motion in its entirety. The Supreme Court refused to grant Morand leave to appeal.[15]

While the results of this decision were expected, as s. 133 clearly provides judges in Québec with the choice of which language to use, a rigorous application of the approach

mandated by Beaulac suggests that the reasoning employed by the court garners the decision an ***Highly Restrictive*** categorization. The court's usage of the political compromises doctrine to deny the language rights claim is an extremely restrictive interpretation of the issue which sets an important precedent. For Québec's top court to rely upon a doctrine and a precedent which had been overturned by Beaulac revives the discredited Acadiens approach and invites the lower courts to rely again on a restrained and narrow approach to language rights interpretation. The application of this precedent could easily result in the emasculation of language rights in more contentious linguistic disputes which can undermine bilingualism a great deal in the province. This interpretation is particularly restrictive in that it was completely unnecessary, as the same result (the dismissal of the motion) could have been achieved simply by reference to the clear provisions of the constitution. The court appeared to go out of its way to bring back the highly restrictive political compromises doctrine which is dangerous for the development of bilingualism in Québec.

R. v. Le (Le no. 1) (2000)[16]

Among the most important legal language rights cases have been those related to s. 530 of the Criminal Code of which R. v. Le (Le no. 1) was one of the first. This case involved a woman of Vietnamese origin living in the London area who was accused of possessing and trafficking cocaine. While her mother tongue was Vietnamese, the accused spoke English and especially French reasonably well. At her first appearance in Court, when the accused was not yet represented by counsel, the first of six informations were formally laid against her (an 'information' is the formal legal document served to an accused on which the charges against him or her are laid out for the purposes of their understanding with what they are being charged. In many cases in this study, the information is a routine traffic ticket). At this appearance, the accused was not informed of her right to have the trial conducted in the official language of her choice under s. 530(3) of the Criminal Code, nor was she allowed to be tried in French under s. 530(2) (the provision which applies to persons whose mother tongue is neither English nor French which allows them to be tried in the official language in which they are most comfortable). On these grounds, the accused's lawyer filed a motion to have all six charges against her nullified.[17]

Deciding solely on the issue of whether the charges against the accused should be nullified, the judge at the preliminary hearing ruled against both language rights claims. While acknowledging that the accused's s. 530(2) rights had been violated, the judge felt that such a violation was not enough to invalidate the proceedings.[18] Similarly, after quoting extensively from Beaulac, the judge found that the violation of the accused's s. 530(3) rights was also insufficient to nullify the proceedings. The judge distinguished the facts of the Beaulac case from the case at bar and argued that since the accused was represented when five of the six informations were laid against her, the violation of the right on the other information constituted only a procedural wrong, not a substantial wrong as in Beaulac.[19] Accordingly, the informations were judged to be valid and the accused was ordered to stand trial. This was the case in spite of the fact that within the passages from Beaulac that the judge reproduced was written: "the violation of s. 530 constitutes a substantial wrong and not a procedural irregularity."[20] In spite of the seeming errors in the use of precedent, the decision was not appealed and the accused proceeded to make another linguistic claim which we will examine later.[21]

This decision should be categorized as ***Highly Restrictive***. The judge admitted that the accused's language rights under ss. 530(2) and 530(3) had been violated to some extent and refused to provide any remedy for the violation. While the nullification sought by the accused's lawyer may have been a drastic measure to request (particularly for a person who had faced criminal charges on several previous occasions[22]), for the judge to dismiss the violations of the language rights as inconsequential contradicts the purposes underlying the rights which are to guarantee the equality of users of French and English in criminal courts. The judge's ignoring or misunderstanding of the Beaulac decision and refusal to admit to the substantial wrong is a very restrictive interpretation of the rights and is a substantial departure from precedent which sets a new precedent that the denial of such language rights has little or no consequence. Such a decision is similar to a ruling which would be rendered if there were no rights at all as it failed to provide meaningful protection through its restrained and narrow interpretation. This interpretation of the language rights reduced the rights to meaninglessness which undermined bilingualism to a great extent. The narrow reading of the linguistic provisions at issue in order to ensure

that the administration of justice was not brought into disrepute by setting the accused free is clearly reminiscent of the Acadiens approach.

R v. Mahaney (2000)[23]

As New Brunswick has the most extensive language rights regime in Canada, it is home to a large number of language rights controversies. Among the rights that New Brunswickers enjoy which has provided fertile ground for language rights disputes is the right of persons accused of provincial or criminal offences to choose the language in which to be served by police and in which to be tried. In most cases in New Brunswick, the officer administering an information provides the accused with a choice of the language in which to be served and tried and notes their decision on the information. In the case of R. v. Mahaney, the accused was charged with driving with expired insurance in an unregistered vehicle. When the accused was stopped by the police to discuss the infraction, the entire conversation took place in French. While the accused spoke French well, the officers failed to ask her the language in which she wished to be issued her ticket. This failure on the part of the officers resulted in the charges against the accused being dismissed under a common law rule in Provincial Court. However, the Crown appealed this ruling.[24]

The New Brunswick Court of Queen's Bench ruled in favour of the Crown. The court held that the accused's understanding of the circumstances of her charges made the language issue irrelevant.[25] It argued that because the accused understood the reasons for her being charged, it was not unfair to give her an information (a written document) in a language she claimed she did not read well. The court ruled in this fashion despite quoting, earlier in the judgment, from the Beaulac case which clearly stipulates that an accused's understanding of the majority official language is without consequence in his/her choice of language in legal proceedings and therefore cannot be used to justify the overriding of his/her language rights.[26] In spite of this apparent contradiction, the appeal was allowed and a guilty verdict was substituted for the original acquittal.

This decision should be categorized as ***Highly Restrictive***. In this case, the Court of Queen's Bench appears to have directly contradicted the Beaulac ruling of which it was obviously aware. In spite of the fact that Beaulac mandates that legal language rights should be interpreted to provide a linguistic minority accused with an absolute right to

determine his/her language in court regardless of his/her comprehension of the majority language, the judge ruled exactly the opposite, that the trial was fair regardless of the linguistic wishes of the accused. In failing to properly apply Supreme Court jurisprudence, the court took away the language rights of the accused. By not permitting the accused to make use of her language rights, the court emasculated those rights which undermines the development of bilingualism in the province substantially. This regressive interpretation also set a restrictive precedent which has potential to effect future language rights disputes, which makes the decision all the more deleterious to the advancement of linguistic equality in the province.

R. v. Boutin (2002)[27]

Another case that concerned the language of informations was Boutin. This case concerned the issue of whether official bilingualism in Ontario courts guarantees the right to an information both the French and English versions of which are sworn under oath. The accused was given a bilingual information *form* with the particulars of his charge written on the form in English only. Having chosen to be tried in French, he was supplied with a French translation of the English information, although only the original English information had been sworn under oath. At trial, the accused, relying on Beaulac and calling for a liberal interpretation of his language rights, argued that because the French version of the information had not been sworn under oath, the information was inadequate to proceed with the charges. The trial judge agreed and acquitted the accused, a decision which the Crown appealed.[28]

The decision of the judge of the Ontario Superior Court overturned the original ruling. Relying on a number of constitutional provisions that do not apply to Ontario[29] which guarantee parties to judicial proceedings the right to use either official language, the judge found that there are no rights to have documents officially translated and sworn for court proceedings.[30] The judge also argued that the institutional bilingualism ordered in Beaulac does not mandate a sworn translation of the information for a number of reasons.[31] In addition, the judge suggested that the accused's submission that an information should be sworn bilingually is both impossible (as those writing an information are rarely sufficiently bilingual to swear to the accuracy of it in both languages) and unconstitutional (because to force them to do so would violate

constitutional rights providing parties with the option of using either language, in spite of the fact that those rights do not apply to Ontario courts).[32] Near the end of the decision, the judge stated:

> Si le parlement, dans sa sagesse, cherche à pousser encore plus l'égalité linguistique, il lui revient, et non aux tribunaux, de le faire, car les tribunaux ne sont pas équipés pour prendre les mesures délicates de *compromis politique* nécessaires afin d'équilibrer les nombreux droits concurrents, dont certains ont été exposés ci-dessus.[33] (emphasis added)

The unilingually sworn information was, therefore, deemed to be valid, the trial court's ruling was overturned and a new trial was ordered for the accused.

This decision should be categorized as ***Highly Restrictive***. Although there was a great deal of ambiguity on the issue of bilingually sworn informations, the court's reliance on an overturned line of judicial reasoning (the political compromises doctrine) and enforcement of constitutional provisions which do not even apply in Ontario place the judgment beyond the bounds of a somewhat restrictive categorization. The judge enforced an overturned and regressive interpretive approach to language rights and used inapplicable constitutional provisions to prevent the granting of the claim which narrowed the scope of the language rights. By establishing a precedent whereby such devices can be used to prevent the granting of other linguistic claims in Ontario, the judge undermined the development of bilingualism in the province and moved bilingualism back to a point where the protections provided in Beaulac are lost. Such an interpretation is highly deleterious to bilingualism and the advancement of linguistic equality.

Somewhat Restrictive

R. v. Cameron (1999)[34]

While the cases described above were all decided extremely restrictively, several other cases were decided less restrictively, though still in a way reminiscent of the narrow and restrained approach of Acadiens. An example of such a decision is the Cameron case, from the Québec Provincial Court. This case involves unique circumstances relating to the translation of evidence at a trial for drug charges, in this case in criminal proceedings. The accused first elected to be tried in French. However, after the trial had commenced, the accused fired his francophone lawyer and hired an anglophone, Morris Manning, the criminal defence lawyer well known for his defence of Henry Morgentaler

in the controversial 1988 abortion case.[35] Unable to speak French, Manning had his client request to have the trial proceed in English under s. 530(4), which the court granted. The accused also asked for the evidence against him, which was thousands of pages, to be translated into English under s. 530.1, arguing that such a translation was critical to his making a full answer and defence. The Crown argued against granting such a translation, suggesting that s. 530.1 contains no such right.[36]

In the decision on this dimension of the case, the trial judge ruled against Cameron and Manning. The judge argued that s. 530.1 contains no automatic right for the translation of evidence and that the Beaulac decision, on which the accused relied, "does not give the Court the power to re-write Section 530.1."[37] The judge ruled that while a court could order such a translation if doing so will make the trial more fair, it is not obliged to do so.[38] The judge also argued that granting the English trial to the accused was enough to provide for a fair trial and that the accused's understanding of the evidence presented against him (as was clear from the fact that the trial began in French and that he had waived his right to an interpreter) militated against the need for a translation. As such, the request was dismissed and the trial continued.

This decision should be categorized as ***Somewhat Restrictive***. While the judgment appears reasonable given the circumstances (with the volume of the evidence and the accused's choice to hire a unilingual lawyer), the refusal of the claim was premised on a narrow reading of the provisions. There is ambiguity in s. 530.1 which stipulates simply that the "record of proceedings" must include "evidence...tendered during those proceedings in the official language in which it was tendered"[39] and is silent on the issue of whether translations which are not to be part of the official 'record' should be provided. In choosing to interpret this ambiguity restrictively to not include the right to a translation, the judge narrowed the parameters of the right which undermined bilingualism in some ways. In doing so, the judge established a restrictive precedent which could work against a member of a linguistic minority in the future who genuinely needs to have evidence translated for them to understand their trial. This decision serves as another good example of a court using a narrow interpretation of language rights provisions (reminiscent of the Acadiens approach) to justify its concern about the administrative convenience of the case.

Lavigne v. Québec (Attorney General) (2000)[40]

Similar to the Morand case, this was another case dealing with the language employed by state actors in legal proceedings in Québec. The litigant, Lavigne, was suing the government of Québec in Federal Court where, at trial, government lawyers argued in French, much to Lavigne's displeasure. Lavigne responded by launching a suit in the Québec Superior Court in which he sought to have the court order Québec to argue in English when requested to do so by the opposing litigant. While the criminally accused have the right to choose the language of their trial (under s. 530 of the Criminal Code), in civil cases such as this one, private litigants have no choice over the language used by government lawyers during the proceedings. In the Québec court, Lavigne argued that Québec's arguing in French contravened his language rights under s. 133 which gives him rights to listen in the official language of his choice. In response to the argument by Québec that s. 133 provides its lawyers the right to speak the official language of their choice in federal (and Québec) courts, Lavigne argued that s. 133 confers rights only upon individuals, not upon the state.[41]

The Québec Superior Court disagreed with Lavigne's claims. Relying on the MacDonald precedent, the judge ruled that all legal proceedings emanate from individuals and that it is those people whose rights are protected by the constitution. These individuals' rights are not lost simply by virtue of representing the state.[42] The judge also ruled that while Lavigne does have a right to understand the proceedings, this is not a language right but a right derived from procedural fairness. Accordingly, this right can be met simply by the court providing an interpreter.[43] Lavigne's motion was therefore dismissed. While Lavigne appealed this ruling first to the Québec Court of Appeal and then directly to the Supreme Court, his appeal was denied in both cases.[44]

In my view, this case should be categorized as ***Somewhat Restrictive***. While the provisions of s. 133 clearly grant government lawyers the right to use either French or English in federal or Québec courts (which would make this decision expected), the judge could have provided a right to listen in the language of the private litigant's choice by following recent case law from Québec. In the case of R .v Cross,[45] the Québec Court of Appeal considered the potential for the contradiction of language rights in s. 530 cases where the accused wished to be tried in one language and the Crown had the right under

s. 133 to argue in the other official language. The court ruled that s. 530 places obligations on the state, not on individuals, to use the language of the accused and that in cases where an accused demands to be tried in English, the Québec government has an obligation to provide a prosecutor willing to speak English (thereby avoiding the clashing of s. 530 and s. 133 language rights). By forbidding the Québec government from assigning a prosecutor who would demand to prosecute in French, the court allowed the rights of all parties to be observed.

In the Lavigne case, the Superior Court could have extended the decision of the Court of Appeal to civil trials, mandating that in cases in which the private litigant wishes to have the trial conducted in English, the Québec government has an obligation to provide English lawyers. By failing to apply this well-known precedent, the judge failed to interpret the litigant's language rights in a purposive manner and failed to extend bilingualism in a way which would advance the equality of Canada's official languages and their users, both of which are called for in Beaulac. The court's interpretation was somewhat narrow and relied upon a discredited precedent in a way that did not extend to linguistic minorities meaningful equality in the justice system as is envisaged by s. 133 and the Beaulac precedent. Once again in this case, a narrow interpretation denied to litigants a right to listen in the official language of their choice, leading to the continuation in Canada of the odd and somewhat silly situation where litigants have the right to speak but not listen in the language of their choice. I would suggest that this state of affairs should be rectified by the Supreme Court in an application of the Beaulac approach. In denying Lavigne leave to appeal, the top court failed to do so in this case.

R. v. Le (Le no. 2) (2000)[46]

Shortly after the commencement of the trial which she had attempted to prevent in her preliminary hearing (Le no. 1), the accused sought to have her trial conducted in French and applied under s. 530(4). The granting of such late applications, however, is at the discretion of the trial judge, depending on what the judge deems to be in the 'best interests of justice.'[47] The Crown argued that the accused should be tried by a bilingual court.

In considering her application, the trial judge (a new judge from the pre-trial hearing) relied heavily upon the Beaulac precedent. In the oral judgment, the judge ruled

that it was indeed in the best interests of justice that Le's application be granted, particularly in light of the fact that Beaulac argued that the denial of a s. 530(4) application should be exceptional.[48] However, the judge also considered the language of the evidence against the accused as well as the language of the witnesses and potential jurors.[49] Citing the Beaulac case which ruled that the best interests of justice can be served with either a trial in the minority official language or a bilingual trial,[50] the judge ordered that it be conducted bilingually as such a trial allows either language to be used which would be most beneficial for both the accused and the other parties.[51]

This decision should be categorized as ***Somewhat Restrictive***. While the trial judge's acceptance of the s. 530(4) application was in accordance with the law as Beaulac states that the denial of such a request should be exceptional and because even the Crown consented to it, the judge's refusal to grant a trial in French was somewhat restrictive. The accused had asked for a trial in French and the judge's granting only of a bilingual trial restricts the accused's language rights to some extent. In considering factors such as the availability of jurors and the language of witnesses, the judge violated Beaulac which states "mere administrative inconvenience is not a relevant factor,"[52] in the denial of a s. 530(4) claim. While the accused's claim was not denied, because only a bilingual trial was granted, it was not fully accepted either. If bilingual trials were granted in all cases where minority language trials were requested, the purposes of s. 530 would be undermined. Those rights are intended to force the state to accommodate the linguistic needs of minority language litigants. Although this decision called on the state to accommodate the accused to some degree, the extent of that accommodation is very limited as Crown prosecutors were still be able to present their case in the language not chosen by the accused. While the opportunity to use French in a bilingual trial was better for the accused than an English trial, part of her trial was still conducted in English, with all the inconveniences associated with such a scenario, which is not an optimal expression of what bilingualism intends to achieve. Though the accused did receive an important concession from the judge, the judge had an option which could have safeguarded the use of her language and advanced bilingualism to a greater extent. In using the ambiguity of the case to decide in favour of the Crown and in violating the

reasons provided in Beaulac, the judge interpreted the language rights restrictively which set back the development of bilingualism to some extent.

Contenants Industriels Lteé v. Québec (Commission des Lésions Professionnelles) (2002)[53]

Similar to Peters, this case concerned another claim about the language of witnesses and testimony in the courts of Québec, in this case in a civil procedure. On a number of grounds, including language rights, Contenants Industriels (CI) appealed a decision rendered by the Commission des Lésions Professionnelles (CLP), which is a quasi-judicial tribunal (exactly the type of tribunal dealt with in the Blaikie cases) designed to adjudicate disputes related to workplace injuries. During the original bilingual hearing concerning the injuries sustained by a unilingual anglophone, the CLP panel adjudicating the dispute asked two francophone witnesses called by CI if they would find it an inconvenience to provide their testimony in English for the benefit of the aggrieved worker (so as to avoid the burden of translating the testimony). The witnesses both answered in the negative although one added that the spontaneity of his testimony would be compromised somewhat by his use of English. The CLP responded in both cases that if the witnesses felt it necessary to use French at any point, they were free to do so. While CI raised no objections to these linguistic issues at the time, one of the grounds for its appeal to the Québec Superior Court was that the language rights of the witnesses had been violated and that the decision (which was obviously unfavourable to CI) was therefore invalid and should be overturned.[54]

The Superior Court ruled in favour of CLP and refused to overturn the tribunal's ruling. CI lawyers had produced a substantial amount of jurisprudence related to language rights and argued that the testimony of the witnesses lacked the spontaneity and nuances that it would have had had the witnesses testified in their mother tongue. However, the court argued that the issue was simply a question of fact, rather than language rights: had the witnesses consented to using English.[55] The court ruled that if the witnesses voluntarily relinquished their rights to testify in French, the court was not justified in overturning the decision of the tribunal.[56] This was particularly so, it suggested, in light of the fact that the CLP had not forced the witnesses to use English and gave them the option of using French if they needed.[57] The fact that the appellant

failed to raise any objection to the alleged language rights violation at the time also led the court to dismiss the claim.[58] This decision was confirmed by the Court of Appeal "in a brief handwritten decision" and leave to appeal to the Supreme Court was denied.[59]

This decisions of both the Québec Superior Court and the Court of Appeal (which is the final provincial court that ruled on this dispute and will thus by counted as the court which rendered the decision in the following chapter) should be categorized as ***Somewhat Restrictive***. While it could be argued that the witnesses waved their s. 133 rights by agreeing to testify in English, it could also be argued that when the tribunal panel asked the witnesses if they would find it an inconvenience to use English, it had the effect of coercing them to do so. A request of that nature from a judicial body can be very compelling to a witness,[60] particularly one not well-acquainted with his/her constitutional rights. The witnesses' agreeing to use English may not have been as voluntary as it may have seemed, particularly in the case of the witness who immediately raised concerns about the quality of his English testimony. While it is unclear whether the rights were voluntarily forfeited, the courts used this ambiguity to decide in a way that was unfavourable to language rights claimants. By failing to uphold the strict application of the s. 133 rights, the courts interpreted these rights narrowly which renders them vulnerable. The courts may have set another precedent where the overriding of language rights in the courts of Québec is permitted in some instances. The application of such a precedent has the potential to significantly undermine the language rights of witnesses in Québec courts, which can set back the development of bilingualism in the province a great deal. In addition, the Québec Court of Appeal continued, in this case, to uphold a narrow interpretation of language rights, which is perhaps the biggest threat to bilingualism in the province. Like the Peters case, this decision made use of a narrow interpretation (like that called for by the Acadiens approach) of the linguistic issue to ensure the administrative convenience of the trial.

Charlebois v. Saint John (City) (2002)[61*]

In spite of the fact that the New Brunswick Court of Appeal ruled that municipalities must be legislatively bilingual (though it did allow one year of temporary

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* This decision has been appealed and argued before the New Brunswick Court of Appeal. The Court reserved judgment after the hearing of the case and the litigants are currently awaiting judgment.

validity to the unilingually enacted statutes) Mario Charlebois was briefly incarcerated for his building code violation. Charlebois demanded that the province compensate him for his jail time but the province refused. In an effort to force the province to compensate him, Charlebois launched two language rights suits, which, if he were to be victorious, could have forced sweeping changes to the provision of government services in New Brunswick and could have cost millions of dollars to New Brunswick taxpayers. He hoped that the province would take the easier route by paying him the compensation he sought.[62] However, the province felt that Charlebois' language rights claims were without merit and preferred to settle the disputes in court. At the trial for one of the lawsuits in which he sought to force the City of Saint John to offer services bilingually, the Saint John lawyers pleaded in English while the province (which was an intervener to the dispute) filed affidavits which contained some English (i.e. quoting case law in English, etc.). To Charlebois, these actions contravened provisions of the New Brunswick Official Languages Act, which called for provincial 'institutions' to use the language chosen by the other party in court proceedings. He therefore made a separate procedural motion to force the city and the province to plead and file affidavits in his chosen language for the trial, French.[63]

In its decision, the New Brunswick Court of Queen's Bench found that the Act did not include municipalities under its definition of 'institutions,' because provisions relating to municipalities were outlined elsewhere in the Act.[64] If municipalities were intended to fall under the scope of 'institutions,' it said, those provisions delineating the linguistic obligations of municipalities elsewhere in the Act would be redundant.[65] As Saint John was not classified by the Act as a city to which bilingualism provisions apply, the City was free to use either official language in its pleadings before the court. In addition, the court quoted passages from a Federal Court decision which argued that forcing parties to make their case entirely in French would contravene rights under s. 133 (after which s. 19(2) of the *Charter*, which applies to New Brunswick, is modeled).[66] The Federal Court also ruled that s. 133 rights are for writers or issuers of written pleadings, rather than readers or listeners.[67] The New Brunswick court adopted the Federal Court ruling, indicating that provincial lawyers were permitted to supply some elements of their argument in English, provided that these were outside the realm of

'pleadings' contemplated in the Act.[68] Ruling that the province had pled in Charlebois' chosen official language, the motion was dismissed. Charlebois has appealed this decision.

This decision should be categorized as ***Somewhat Restrictive***, as there was a degree of ambiguity in the dispute as it related to the 'pleadings' of the New Brunswick lawyers. While it was relatively clear that municipalities were dealt with in other parts of the Act, the issue of whether the province could use English in parts of its written submissions was not clear in the Act. The court's choosing to rely upon a Federal Court decision which was not binding on New Brunswick courts and which interpreted language rights in a narrow fashion is clearly restrictive. The court could very easily have interpreted the Act purposively to mandate that the province must use the language of its opponent throughout its argument, choosing instead to interpret 'pleadings' very restrictively. This sets a narrow precedent by which the provincial government can avoid the language obligations it had passed in certain circumstances. While the government of New Brunswick's opposition to the assertion of the language rights claimed in this case by Charlebois is perhaps the bigger loss for the New Brunswick minority community, the decision itself is also a loss for that community.[69]

R. v. St-Amand (2002)[70]

Another case involving traffic ticket issues in New Brunswick was R. v. St-Amand. In this case, the accused was charged with impaired driving, although the information charging him was written entirely in French. The trial at the New Brunswick Provincial Court took place entirely in English. Near the end of the trial, counsel for the accused objected to the fact that the Crown had not translated the information. Counsel alleged that although the French information served no disadvantage to the accused, the accused should be set free because the information was not properly submitted to the court. The trial judge disagreed with this argument and convicted the accused. This verdict was appealed with the accused arguing that a common law rule exists which determines that the information should have been translated into English and that in the absence of such a translation the trial was unfair.[71]

The decision of the New Brunswick Court of Queen's Bench upheld the conviction. The court argued that to accept the defence of the accused would be to create a new

defence where the onus is not on the accused to prove that he/she is disadvantaged at trial, as is customary in common law proceedings.[72] The court ruled that the case at bar was an issue of law, not language and that the only issue at stake is whether the accused could make full answer and defence which, in the court's opinion, he could.[73] The court also objected to the fact that the argument about the lack of translation came so late in the trial. An information, it explained, is to ensure that the accused understands what he/she is being charged with and it is thus necessary to understand the information at the beginning of the trial.[74] To proceed with the majority of the trial before asking for clarification of issues relating to the information suggests that the accused did indeed understand what he was being charged with and was thus able to make a full answer and defence to the charges. To dismiss the charges on the grounds argued by the accused, the court ruled, would be to acquit an otherwise guilty person without a rights violation.[75] An application by the accused for leave to appeal to the New Brunswick Court of Appeal was denied.

This decision should be categorized as ***Somewhat Restrictive***. As the issue in this case related to linguistic procedural irregularities (rather than the language of proceedings which is more clear in New Brunswick law and would probably have been more advantageous to the accused), the court used the ambiguity surrounding such procedural issues to rule against the claimant. The court could have decided that trial judges have an obligation to ensure that the provisions of an information are understood or that all such informations must be written bilingually, both of which would have advanced bilingualism and provided added protection for linguistic minorities in the province. Having ruled instead that the accused's reasoning is not a valid defence in the face of procedural ambiguity, the court interpreted the language rights provisions in a narrow fashion which undermined the development of the bilingualism regime in New Brunswick slightly. Had the court been asked to rule upon the lack of choice afforded to the accused of the language of proceedings, the result may have been quite different.

R. v. Mackenzie (2004)[76]

The Mackenzie case involved an unrepresented litigant in a Nova Scotia court who was charged with speeding under provincial law. Under Nova Scotia law, persons accused of provincial offences have the same language rights as do the criminally

accused (i.e. s. 530 rights apply to provincial offences), including the right to be informed of their legal language rights when unrepresented. On appeal, the Supreme Court of Nova Scotia determined that because the trial judge in provincial court had failed to inform the accused of her rights to a French trial, the accused's *Charter* rights under ss. 16(1) and 19(1) had been violated and a stay of proceedings was in order. The Crown appealed this ruling to the Court of Appeal, arguing that a new trial should have been ordered.[77]

The Supreme Court of Nova Scotia had ordered a stay of proceedings so as to deter future violations of s. 530(3), which, it argued, was of greater value to society than convicting the accused of speeding.[78] However, the Court of Appeal disagreed with this assessment. It overruled the lower court's ruling that the violation of the accused's rights contravened ss. 16(1) and 19(1) of the Charter, arguing that those provisions did not apply in this case (as Nova Scotia is not an officially bilingual province).[79] It also argued that the legislation applying s. 530 to Nova Scotia cannot be said to be constitutionally protected by s. 16(3) of the *Charter*, (i.e. it rejected the 'ratchet principle').[80] Therefore, the court reasoned, no *Charter* violation had occurred which meant that remedies pursuant to s. 24 of the *Charter* could not be considered.[81] The court also rejected an argument based on the 'protection of minorities' principle from the Secession Reference.[82] With the failures of these constitutional arguments, the court relied upon Supreme Court of Canada jurisprudence which indicates that a stay of proceedings should only be applied in rare circumstances (where the *Charter* does not apply) which were clearly not present in the case at bar.[83] The Court thus ruled that the lower court's failure to properly apply the Supreme Court jurisprudence was an error in law, overturned the stay and ordered a new trial.[84]

This case should be categorized as ***Somewhat Restrictive***. There was a great deal of ambiguity in the circumstances of the case which the court used to decide against the litigant. A number of language rights-related arguments on constitutional grounds (including the Secession Reference principle argument) were raised by the lower court and the litigants, a liberal interpretation of which could have been used to justify a remedy under s. 24 of the *Charter*. However, in refusing to agree with the lower court that the prevention of future language rights violations justified the staying of

proceedings, or with the litigants who argued that the statutory language rights had constitutional protection, the court failed to extend much meaningful protection to the accused, in spite of the clear violation of her language rights. This interpretation is a narrow view of the purposes of the rights. This restrictive interpretive approach denied the accused any significant constitutional protection and provided her with an undesirable remedy (a new trial) in spite of the clear violation of her language rights. The refusal to grant sufficient constitutional protection in this case appears to be a contradiction of Beaulac which ordered that the purposes underlying language rights must be considered and that the state must take positive action to implement these rights. By failing to give them a liberal and purposive interpretation, the language rights were denied meaning, which undermined those provisions significantly. The application of such a restrictive precedent in a case where the language rights violation is much more severe could have serious consequences for the advancement of the equality of French and English in Nova Scotia.

Expected

Wittenberg v. Fred Geisweiller/Locomotive Investments Inc. (1999)[85]

One of the first cases that did not involve the significant expansion or narrowing of the bilingualism policy was the Wittenberg case which concerned the language of a trial in the Ontario Small Claims Court. The defendant requested the court to have the trial conducted before a bilingual judge. However, a bilingual judge was not made available for the case. At trial, the defendant asked the unilingual judge if he could argue in French. The judge declined the request as he was not capable of understanding the defendant in French, ruling also that the defendant should have made a formal application. The judge asked the defendant if he felt 'hampered' arguing in English, to which the defendant responded affirmatively. The trial judge then indicated that he would try to help the defendant understand where necessary and the trial proceeded in English.[86]

The Ontario Superior Court of Justice judge who heard the appeal of the decision by the Small Claims Court judge invalidated the decision of the lower court. He ruled that under s. 126 of the Courts of Justice Act of Ontario, which provides for the right to a bilingual trial, "[t]he defendant clearly was entitled to require that the trial be conducted

as a bilingual proceeding."[87] The judge ruled that there are important reasons for the existence of language rights and that s. 126 of the Act should therefore be interpreted broadly.[88] He suggested that although Small Claims Court is intended to be inexpensive, this convenience is not meant to come at the expense of language rights.[89] Accordingly, the appeal was allowed and a new trial before a bilingual judge was ordered.[90]

This decision should be categorized as ***Expected***. There was little ambiguity in the provisions at issue in this case. Section 126 of the Courts of Justice Act clearly calls for a bilingual trial when requested, regardless of the circumstances such as the nature of the Court or abilities of the presiding judge. In ordering the new trial, the appeal judge did not advance of undermine bilingualism in any way and simply decided the issue the way that is called for by the Act.

R. v. Lafrance (1999)[91]

Similar to St-Amand and Mahaney, the language of a traffic ticket and trial in New Brunswick was the central issue in Lafrance as well. In that case, the linguistic preferences of the accused were not noted on the ticket and were not asked of the accused at trial. Near the end of the trial, the accused's lawyer mentioned the lack of linguistic choice afforded to the accused and raised the issue of the possible infringement of his client's *Charter* rights (presumably under s. 19(2)) that may have resulted.[92]

In a brief oral decision (which at times lacked a suitable degree of detail to be sufficiently comprehensible), the New Brunswick Provincial Court considered the issue of whether the failure of the police officer to determine the language of the accused and the court's failure to offer a trial in the official language of the accused's choice affected his right to a fair trial and other *Charter* rights.[93] In concluding that these failures did indeed impact the accused's rights, the judge relied on earlier jurisprudence which held that New Brunswick's *Charter* provisions were enacted in order to oblige police officers to respect language issues.[94] In the case at bar, the judge ruled, certain procedural steps were not followed (i.e. indicating the accused's choice of language on the information) which resulted in the compromising of the fairness of the trial. Therefore, the *Charter* had been violated and in accordance with its s. 24 remedy clause, the accused was acquitted.[95]

This decision can be categorized as ***Expected***. As the appropriate procedures for trying an accused were not followed in the case, the trial judge had little choice but to acquit him. The *Charter* is clear that everyone has the right to use the official language of their choice in the courts of New Brunswick and with the officer and the court having failed to offer the accused his linguistic choice, his rights had clearly been violated. Due to this procedural unfairness, the trial judge had no option but to acquit the accused. This decision did not advance or undermine bilingualism in the province but simply upheld the constitutional provisions as they were meant to be applied. Based on the diverse interpretations of the language rights relating to the language of traffic tickets in New Brunswick, it appears that it would be helpful to the lower courts if the Court of Appeal provided some guidance as to how this issue should be treated.

R. v. Deveaux (1999)[96]

This case from Nova Scotia concerned the right of a French speaking accused to be informed of his right to a trial in French under s. 530(3) of the Criminal Code. Under that section, a trial judge has an obligation to inform an unrepresented accused of his/her right to be tried in the official language of his/her choice or both languages. The accused, who was charged with assault, was not informed of his s. 530 rights at his election (where he was unrepresented) and was tried and convicted entirely in English (he was represented at trial). This conviction was later appealed to the Nova Scotia Supreme Court on the grounds that the accused's language rights had been violated by the trial judge.[97]

The Nova Scotia Supreme Court's decision was unequivocally in favour of the accused. The appeal judge stated: "Section 530(3) of the Criminal Code is mandatory. The word 'shall' imposes a statutory obligation on the trial judge…to advise [an accused] of his rights."[98] The judge argued that the Beaulac decision mandates that the state must take positive steps to provide language rights and that violations of s. 530 are substantial wrongs, not minor procedural wrongs for which appeals of this nature can be dismissed.[99] The judge also ruled that the trial judge had no room to exercise discretion in the case as the right is automatic.[100] The trial judge's failure to inform the accused was thus deemed to be a violation of ss. 15, 16 and 19 of the *Charter*, the appeal was allowed and a new trial in French was ordered.[101]

This decision should be categorized as ***Expected***. The provisions of s. 530(3) are clear and they were applied by the Nova Scotia Supreme Court. A breach of the right had clearly taken place at trial and the Court's remedy, to order a re-trial in French, was a practical and just solution. As such, this decision respected the will of the legislature and did not create or take away any rights.

R v. Desgagné (2003)[102]

Echoing the Mercure case of 1988, the Desgagné case concerned a unilingual speeding ticket administered in Saskatchewan. The accused argued that according to Saskatchewan's Language Act, he had the right to have the ticket against him written in French and that the officer's failure to do so made the information void. The accused argued that because the MacDonald and Acadiens precedents (which formed the basis for the Acadiens approach which was applied in Mercure) had been overturned by the Supreme Court in Beaulac in favour of a more liberal interpretive approach, a purposive interpretation of the Language Law should be applied and he should be acquitted.[103]

The Saskatchewan Provincial Court disagreed with the accused. The judge distinguished between s. 530 of the Criminal Code (which was at issue in Beaulac) and the Saskatchewan Language Act. The judge found that while the former gives litigants the right to determine the language of proceedings, the latter does not and provides only the right to use either French or English in the courts of the province to all parties to a dispute.[104] This includes the issuers of informations who have a choice of which language to employ in administering tickets.[105] In addition, similar to judges in New Brunswick and Nova Scotia,[106] the Saskatchewan judge ruled that the accused had failed to ask to be served in French by the officer and that in the absence of such an indication, police officers are under no obligation to offer services in French.[107] Accordingly, the accused was convicted of the speeding charge.

This case should be categorized as ***Expected***. Even with the new interpretive approach set out in Beaulac, the provisions of Saskatchewan's Language Act are clear in providing everyone the right to use either English or French in judicial proceedings, including police officers. By granting the request of the claimant and ruling that a speeding ticket had to be printed in the language of the accused to be valid, the court would have been re-writing the law in Saskatchewan and granting language rights to the

accused that simply did not exist by statute or in the constitution (while taking away rights from the officer). By convicting the accused, the court did not create any new, or derogate from any existing, language rights in the province and simply interpreted the dispute in accordance with the clear provisions of the law. The accused's effort to regain some of what had been lost in the fallout from the Mercure decision was without much grounding legally and should probably have been pursued in the political realm instead.

R. v. Rose (2003)

This case involves an impaired driving charge against a francophone in the Newfoundland and Labrador Provincial Court. The accused was detained by police upon being observed to be driving erratically after leaving a bar. The accused was asked (all transactions took place in English) to provide breath samples but refused to do so, wishing to speak to 'someone' in French. With no French speaking officers or legal counsel available, the police could not comply and asked again for a breath sample. Having been unable to speak to 'someone' in French, the accused refused to provide breath samples (which is usually penalized with a sentence similar to that given to a person who provides samples which are beyond the legal blood alcohol limit, except in rare cases where the accused has a reasonable excuse for not providing such a sample). The accused was then charged for failing to provide breath samples. At trial, the accused argued that the failure of the police to allow him to speak to anyone in French constituted a reasonable excuse for not providing a breath sample and that the Crown had little evidence to prove that he was driving with an illegal blood alcohol level.[108]

The trial judge ruled against the accused. The judge found that the refusal to give breath samples in the absence of speaking to someone in French would constitute a valid defence only if the accused was unable to understand what was happening and why he was being detained.[109] In this case, the accused fully understood what was happening and what the consequences of his non-compliance were (because he fully understood English) and speaking to someone in French would not have aided in his comprehension of the situation.[110] As Newfoundland and Labrador is an officially unilingual province with no language rights for an accused at detention, the accused's reasons for failing to supply a breath sample were invalid and he was convicted.[111]

This decision should be categorized as ***Expected***. As the accused was making a language rights claim that does not exist in statute or in the constitution, the trial judge had little recourse but to convict him for failing to provide breath samples. The evidence was clear and undisputed and in the absence of any language rights to rely upon, there was no ambiguity to the situation, the accused was clearly guilty. As the accused was making a language rights claim which did not exist in law, the judge could not be said to have interpreted the rights of the accused restrictively and thus cannot be said to have undermined or advanced bilingualism in the province.

Somewhat Liberal

R. v. Stadnick (2001)[112]

While the decisions in each of the above cases either narrowed the scope of bilingualism or maintained the status quo, a few legal language rights cases were decided in liberal fashion in accordance with the orders of Beaulac. Stadnick was one such case. Like the Cameron case, this case concerned the language of evidence under s. 530.1. The accused, a member of the Hell's Angels motorcycle gang, was on trial bilingually for first degree murder. His lawyer asked for the Crown to disclose all the evidence against him in English, which the Crown refused to do (the Crown had disclosed some, but not all, evidence in English). The accused then requested the court to rule that the Crown should be forced to disclose the remainder of the evidence in the accused's language.[113]

In a decision rendered after the Cameron judgment, the Québec Superior Court ruled that it was not necessary for the Crown to disclose all the evidence in English. The judge indicated that s. 530.1(g)(iii) mandates that evidence is to be tendered in the official language in which it was gathered. The judge added: "I cannot stress enough that there is no correlative obligation in the Criminal Code…to provide a systematic translation of all the documents and evidence that is disclosed."[114] The judge also quoted from case law which stipulated that the Crown has no duty to translate all its evidence for the defence (as doing so would, in effect, be a case of the Crown aiding the defence).[115] In response to the argument that the inability of the accused to understand the evidence against him compromises the fairness of the trial, the judge ruled that because interpreters would be present at the trial (most of which would be conducted in English), procedural fairness would not be compromised.[116] However, the judge was not convinced that the Crown

could be allowed to disclose solely in French and ruled that when requested, it was obligated to provide a translated version of the summary (or précis) of the evidence that it normally provides for the accused.[117] This ruling gave the accused more than the Crown was willing to provide but did not provide him with a full translation of all the evidence against him.[118] An application to appeal this decision by the accused directly to the Supreme Court was denied by that Court.[119]

This decision should be categorized as ***Somewhat Liberal***. While s. 530.1 does not clearly state whether the right to be tried in the official language of the accused's choice includes the right to a translation of evidence, the Superior Court used this ambiguity to attempt to find a compromise which gave something to both parties. By providing the accused with a translated summary of the evidence, the judge gave him part of what he wanted while not placing too great a burden on the Crown. This judgment interpreted the scheme of s. 530 purposively and expanded the provisions of the scheme to provide a limited degree of protection for litigants' language rights without rewriting the text of the provisions. In this way, the decision expanded bilingualism by increasing the parameters of s. 530 to include a right to a translated summary. While it is true that the court could have expanded the provisions to a much greater extent, the effect of the decision is still the strengthening of the right which is an incremental development of bilingualism.

R. v. Charest (2001)[120]

The Charest case began when the accused was charged for allowing her dog to run free without a leash contrary to Toronto civic by-laws. The information charging her with this offence was entirely in English. Having asked to be tried in French under the Ontario Courts of Justice Act, the accused contested the validity of the trial due to the unilingually English information. Such an information, she argued, violated her language rights under s. 16(1) of the *Charter*. In response, Toronto city lawyers argued that s. 16(1) does not apply to civic offences and that the language rights should be read restrictively in this case.[121]

In its decision, the provincial court considered the impact of the Beaulac case on the issues. Contrary to the recommendations of the city,[122] the judge found that Beaulac prohibits a restrictive interpretation of language rights provisions and mandates a re-evaluation of the treatment of language rights issues by the courts.[123] In light of the need

for such a liberal interpretation, the trial judge held that when a French trial is requested, a French information should be provided by the city.[124] Such an information is necessary, the judge ruled, because it is fundamental in legal proceedings that an accused understands the accusations against them.[125] While the city had relied on a 1997 precedent in which language rights were interpreted restrictively, the judge ruled that the Beaulac precedent dramatically changed judges' obligations when interpreting language rights and that the precedent is no longer binding.[126] In addition, the recent passing of a regulation by the government of Ontario (Regulation 53/01) mandated that the simple request of a French trial, even for cases involving provincial offences, means that the proceedings must take place in that language.[127] This, in the judge's opinion, includes informations. Near the end of the decision, the judge administered an harsh rebuke of the city lawyers:

> Il est malheureux de constater qu'une ville comme la ville de Toronto - et ça ce n'est pas exactement un village perdu au fond des bois - une ville, une capitale d'une province qui compte plus d'un demi million de francophones, ne fasse aucun effort pour interpréter ses obligations en vertu de la Loi sur les tribunaux judiciaires d'une façon plus généreuse à l'égard de ces citoyens de la minorité de la langue officielle…[128]

With this reasoning, and after reviewing many of the observations made by the Ontario Court of Appeal in the Lalonde case (released the previous week) which confirmed the necessity of interpreting language rights in a liberal fashion,[129] the judge ruled that the unilingual information should be interpreted to be invalid and that the accused should be acquitted.

This decision should be categorized as ***Somewhat Liberal***. While it is true that Ontario law provides rights to a trial in French, it was not clear whether the rights to such a trial included the right to an information in French as well. The court used this ambiguity to decide in favour of the claimant and relied directly on the liberal and purposive approach directed by Beaulac in reaching this conclusion. In doing so, it expanded the scope of the right to a French trial in Ontario which advanced bilingualism in the province by conferring an additional (or at least expanded) right. It also set a precedent whereby the provisions allowing French proceedings should be interpreted to include more than simply the actual trial.

R. v. Schneider (2003)[130]

Another case which related to an accused without a lawyer, Schneider dealt with the scope of s. 530 rights. Schneider was accused of assaulting several sheriffs in an earlier appearance before the Nova Scotia Provincial Court. She had successfully requested for her trial to take place in French and had asked twice for an adjournment in order to give her more time to find a competent francophone lawyer in Halifax. At her second pre-trial request for an adjournment, she requested (in French) the adjournment from an English judge. The judge instructed her to request it from a French speaking judge. Her next appearance before the court was the start of her trial (which was her first appearance before a French speaking judge). At this time, the accused asked the judge for an adjournment in order for her to find representation. The trial judge declined her request, stating that she had had ample time to prepare and that all of the witnesses (including one who had travelled a great distance) were in attendance (i.e. the timing of the request was the reason for its not being granted). However, Schneider protested that she had not been given an opportunity to ask for an adjournment from a French speaking judge at any earlier date, leading to the unfortunate timing of her request. After being convicted of the assault, the accused appealed, alleging that s. 530 gives litigants the right to make pre-trial motions in their chosen language. Schneider argued that this right had been denied her which resulted in her having to make a request for an adjournment from a French judge at a time that was inconvenient which led to its refusal.[131]

On appeal, the Nova Scotia Supreme Court sided with the accused. The appeal judge relied extensively on Beaulac, particularly the aspects of the decision which mandate that the state must make an active offer for language rights to be enjoyed and that s. 530 gives an absolute right to linguistic equality.[132] While the Crown had argued that the appeal should be dismissed because other provisions in the Criminal Code dealt with pre-trial motions, the judge disagreed, ruling that Beaulac called for a liberal and purposive interpretation of language rights.[133] The judge argued that due to the interest intended to be protected by s. 530, it should be interpreted to include pre-trial motions.[134] The judge ruled that had an English speaking litigant been in a similar position, he/she would have been able to make the request for an adjournment from a judge speaking their language before the trial began and avoid the bad timing that affected Schneider's

application, which constitutes an inequality for speakers of the two languages.[135] The judge argued that the trial judge had erred in weighing the wasting of state resources over the rights of the accused and ordered a retrial.[136]

This decision is a good example of a ***Somewhat Liberal*** ruling. In finding that s. 530 rights include pre-trial motions, the appeal court judge extended the provisions of bilingualism. There was ambiguity in the language rights of s. 530 and the judge made use of this ambiguity to rule in favour of the litigant and to extend the scope of official bilingualism. The result of this ruling is to provide a liberal precedent for the extension of s. 530 and the expansion of the right to use the official language of the accused's choice in criminal proceedings. This decision therefore advances the equality of Canada's two official languages in criminal proceedings, which advances bilingualism.

R. v. Miljours (2003)[137]

The issue of bilingual court documents arose again in the Miljours case. In this case, the accused, Miljours, had had his driver's licence suspended after he was found guilty of impaired driving. However, the deposition suspending his licence, which was bilingual, had discrepancies between its English and French versions, only the latter of which was read by the accused. While the French version prohibited the accused from driving a 'véhicule automobile,' the English version prohibited him from driving a 'motor vehicle.' During the time when his licence was suspended, the accused was caught by police driving a tractor (while farming). At his trial, the accused successfully argued that having only read the French version, he was under the impression that while he was prohibited from driving a car, a tractor would not fall within the definition of 'véhicule automobile.' The Crown appealed the acquittal ruling of the provincial court.[138]

The issue to be decided by the Ontario Superior Court was whether the accused had the *actus reus* ('guilty action,' whether driving the tractor even constituted a crime) and *mens rea* ('guilty mind,' whether he had intended to commit a crime) to commit an offence in light of the possible ambiguity in the French version of the deposition (it was conceded that there was little ambiguity in the phrase 'motor vehicle' which the accused had not read on the English version of the form).[139] While this case does not deal specifically with any statutory or constitutional language rights provisions, the interpretation of the judge is important for an interpretation of language rights provisions.

The judge ruled that the inevitable discrepancies between English and French versions of legal documents should not be used punitively against citizens, as doing so would legally oblige citizens to understand both the English and French versions of the documents: "Les devoirs rattachés au bilingualisme sont imposés au gouvernement pour que les individus puissant fonctionner en tarn que citoyens en français ou en anglais, sans avoir à apprendre les deux langues."[140] Relying on Beaulac and on a 1974 Supreme Court decision which mandated that ambiguities of this nature should be decided in favour of the accused, the judge ruled that there was sufficient doubt of the accused's *mens rea* and a great deal of doubt concerning his *actus reus*[141] that the appeal should be dismissed.[142] Accordingly, the accused was set free.

This decision should be categorized as ***Somewhat Liberal***. In using the ambiguity of the situation to decide in favour of the accused, the judge safeguarded the right of francophones to rely on French versions of court documents. Had the judge ruled against the accused, the accused would have been punished simply for being a francophone and for reading an official court document in his native language. Such a decision would have undermined the equality of the two languages in the province substantially by forcing franco-Ontarians to fully understand English, which would render the bilingualism provisions that relate to court documents relatively meaningless. By ruling in favour of the accused, the court strengthened bilingualism in Ontario by reaffirming its commitment to the validity of French versions of court documents. The court also set a precedent in which the benefit of the doubt is afforded to a member of a linguistic minority in cases where linguistic misunderstandings arise.

Conclusion

As we have seen in the last two chapters, provincial courts in Canada have interpreted language rights claims in widely divergent ways. While some decisions appear to have been interpreted liberally in accordance with the Beaulac precedent, others have been interpreted much more restrictively, in many cases in accordance with the Acadiens approach. Based on this variety of interpretations, it appears that the dichotomized and often contradictory jurisprudence of the Supreme Court has led to the application of both the restrictive and liberal interpretive approaches in the courts of the provinces. This appears to be the case in spite of the Court's efforts to provide clear

direction with its latest language rights precedent and interpretive approach. Although language rights are not being applied consistently in one direction or another in the provinces, a number of patterns can be discerned which will aid in making general observations about how language rights are being interpreted. It is to this larger analysis that we now turn.

NOTES

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[1] R. v. Peters (1999), 33 Criminal Reporter (5th) 83.
[2] This summary of the facts of the case is drawn from paras. 1-36 of the judgment.
[3] Peters, para. 37 and 39.
[4] Ibid., at paras. 41 and 46.
[5] R. v. Peters; R. v. Rendon. This decision of the Supreme Court is the only case in which the 'final decision' of the courts will not be included in our analysis. In this case, only the decision of the Québec Court of Appeal will be factored into our analysis.
[6] R. v. Peters; R. v. Rendon, [2001] 1 S.C.R. 997.
[7] Ibid., para. 3.
[8] Although if this is the reason for the low-profile judgment, the logical follow-up question is why would the Court grant leave to appeal to the litigants at all, particularly as its decision simply confirmed the ruling provided by the Québec Court of Appeal? The Supreme Court's motivations in deciding this case are truly perplexing. More will be said about the Court's strategic avoidance of language rights cases in the concluding chapter.
[9] Morand v. Québec (Attorney General), [2000] J.Q. No. 3301.
[10] This summary of the facts of the case is drawn from para. 3 of the judgment.
[11] Morand, para. 7.
[12] Ibid., para. 10.
[13] Ibid., para. 8.
[14] Ibid.
[15] Morand v. Québec (Attorney General), [2000] C.S.C.R. no 589.
[16] R. v. Le (Le No. 1), [2000] O.J. No. 246.
[17] This summary of the facts of the case is drawn from paras. 9, 19 and 32-35 of the judgment. The accused also alleged that her rights to an interpreter under s. 14 of the *Charter* had been violated.
[18] Le no. 1, para. 35.
[19] Ibid., paras. 41-42.
[20] Ibid., at para. 40 (para. 54 in Beaulac). The Commissioner of Official Languages also found that the court applied Beaulac improperly: "the extracts it chose to reproduce from the judgment seemed unrelated to issues raised by subsection 530(2) of the *Code*." Commissioner of Official Languages (2001), 48.
[21] The accused's attempts to have the proceedings nullified due to the alleged violation of s. 14 of the *Charter* were also dismissed, due to her apparent proficiency in English.
[22] According to paras. 21-23 of the judgment.
[23] R. v. Mahaney (2000), 226 N.B.R. (2d) 54.
[24] This summary of the facts of the case is drawn from paras. 1-9 of the judgment.
[25] Mahaney, para. 22.
[26] Ibid., para. 16. The Supreme Court in Beaulac stated: "the ability of the accused to express himself in English…is irrelevant," and "[i]f the right of the accused to use his or her official language in court proceedings was limited because of language proficiency in the other official language, there would in effect be no distinct language right," at paras. 45 and 47, respectively.
[27] R. v. Boutin, [2002] O.J. No. 2245.
[28] This summary of the facts of the case is drawn from the Commissioner of Official Languages (2003) discussion of the case at 55.
[29] Including s. 133 of *Constitution Act, 1867* and s. 19 of the *Charter* which do not apply to Ontario courts. The judge also relied upon s. 126(6) of the Ontario Courts of Justice Act (which does apply to Ontario

courts), which, in describing court translation of documents, makes no mention of the need for translated informations to be sworn under oath.

[30] Boutin, paras. 8-12.

[31] At paras. 14-17 the judge argued that the institutional bilingualism envisaged by Beaulac applied only to the courts and not the police, that s. 133 (which does apply in Ontario but was still relied upon) gives everyone a right to use the language of their choice and that while the Criminal Code requires bilingual information forms, it does not require the handwritten particulars on the forms to be bilingual.

[32] Boutin, para .18.

[33] Ibid., para. 21.

[34] R. v. Cameron, [1999] Q.J. No. 6204.

[35] R. v. Morgentaler, [1988] 1. S.C.R. 30.

[36] This summary of the facts of the Cameron case is drawn from paras. 1-3, 6 and 9 of the judgment.

[37] Cameron, para. 15.

[38] Ibid.

[39] Section 530.1(g)(iii)

[40] Lavigne v. Québec (Attorney General), [2000] Q.J. No. 5791.

[41] This summary of the facts of the case is drawn from paras. 1-10 of the judgment.

[42] Lavigne, para. 13.

[43] Ibid., para. 19.

[44] The dismissal of the appeal (without costs) by the Supreme Court is found at Lavigne v. Québec [2001] S.C.C.A. No. 499.

[45] R. v. Cross, (1998) 165 D.L.R. (4th) 288.

[46] R. v. Le (Le No. 2), [2001] O.J. No. 4218. Although it is reported in 2001 databases, the judgment of this case was actually released in 2000 and will thus be counted as a 2000 decision.

[47] This summary of the facts of the case is drawn from paras. 3-5 of the judgment.

[48] Le, paras. 21-26.

[49] Ibid., paras 7 and 15.

[50] Ibid., para. 51. At para. 49 of Beaulac, the Supreme Court majority states: "No argument was made concerning the discretion of the judge to order a trial before a judge and jury who speak both official languages of Canada as opposed to a trial before a judge and jury who speak only the language of the accused.... I would only say on this question that the basic right of the accused is met in both cases."

[51] Ibid., paras. 41 and 52.

[52] Beaulac at para. 39.

[53] Contenants Industriels Lteé v. Québec (Commissions des Lésions Professionnelles), [2002] J.Q. No. 432.

[54] This summary of the facts of the case is drawn from paras. 1-27 and 41-52 of the judgment.

[55] Contenants Industriels, paras. 53, 56.

[56] Ibid., para. 55, 58.

[57] Ibid., paras. 55, 58.

[58] Ibid., para. 54.

[59] Commissioner of Official Languages (2003), 63. This case will be classified as a Québec Court of Appeal decision as it was that court which rendered the final ruling on the issue.

[60] Indeed, according to CIL's lawyer, both witnesses testified before the Québec Superior Court that they felt surprised by the CLP's request and felt obliged to accede to it. Commissioner of Official Languages (2003) 63.

[61] Charlebois v. Saint John (City), (2002) 255 N.B.R. (2d) 396.

[62] This summary of the reasons Charlebois went back to court is derived for a press release which is reproduced at para. 9 of the judgment. He also launched another suit, Charlebois v. New Brunswick (2002) 252 N.B.R. (2d) 335, which was dismissed by the New Brunswick Court of Queen's Bench for procedural reasons.

[63] Charlebois v. Saint John, para. 3.

[64] Ibid., para. 6. Provisions relating to municipalities were contained in s. 36 of the Act, rather than s. 22 which mandates that 'institutions' must use the language chosen by the accused.

[65] Ibid.

[66] Ibid., para. 10.

[67] Ibid.

[68] Ibid., para. 11.
[69] According to Charlebois' press release, New Brunswick's main Acadian groups do not support him in his controversial crusade against the province. Ibid., para. 9.
[70] R. v. St-Amand (2002), 252 N.B.R. (2d) 359.
[71] This summary of the facts of the case is drawn from paras. 1-3 and 16 of the judgment.
[72] St-Amand, para. 17.
[73] Ibid., para. 22.
[74] Ibid., paras. 29 and 36.
[75] Ibid., paras. 29 and 37.
[76] R. v. Mackenzie, [2004] N.S.J. No. 23.
[77] This summary of the facts of the case is drawn from paras. 1-11 of the judgment.
[78] Ibid., para. 22.
[79] Ibid., paras. 34-59.
[80] Ibid., paras. 55-57. This 'ratchet principle' whereby legislation aimed to protect official language minorities cannot be undermined (only improved) because s. 16(3) prohibits the reduction of statutory rights by the legislatures, has been rejected now by the Courts of Appeal in Nova Scotia (Mackenzie), New Brunswick (Charlebois v. Moncton), Québec (Baie d'Urfé) and Ontario (Lalonde).
[81] Ibid., para. 68.
[82] Ibid., para. 67.
[83] Ibid., paras. 72-92.
[84] Ibid., para. 94.
[85] Wittenberg v. Fred Geisweller/Locomotive Investments Inc. (1999), 44 O.R. (3d) 626.
[86] This summary of the facts of the case is drawn from pp. 626-627 of the judgment.
[87] Wittenberg, 627.
[88] Ibid.
[89] Ibid.
[90] Ibid., 628.
[91] R. v. Lafrance (1999), 219 N.B.R. (2d) 118.
[92] This summary of the facts of the case is drawn from paras. 1 and 4 of the judgment.
[93] Lafrance, para. 5.
[94] Ibid., para. 2.
[95] Ibid., para. 6.
[96] R. v. Deveaux (1999), 181 N.S.R. (2d) 81. Although this decision appears in the 2000 volume of the Nova Scotia Reports, the judgment was actually delivered in late 1999 and will thus be counted as a 1999 decision.
[97] This summary of the facts of the case is drawn from paras. 1-3 and 14 of the judgment.
[98] Deveaux, para. 6.
[99] Ibid., paras. 7 and 17.
[100] Ibid., paras. 4 and 14.
[101] Ibid., paras. 15 and 18. The alleged *Charter* violations were a subject upon which the judge did not elaborate. Such *Charter* violations are a subject on which the Nova Scotia Court of Appeal would have much to say in a later ruling.
[102] R. v. Desgagné, (2003) 237 S.R. 166.
[103] This summary of the facts of the case is drawn from paras. 1-8 of the judgment.
[104] Desgagné, para. 13.
[105] Ibid., para. 16.
[106] See the Cormier and Doucet decisions in chapter six.
[107] Desgagné, para. 22.
[108] This summary of the facts of the Rose case is drawn from paras. 1-36 of the judgment.
[109] Rose, para. 70.
[110] Ibid., para. 93.
[111] Ibid., para. 97. As a unilingual province, with no language rights applying in the situation at issue, the accused's competence in English was relevant. While the Beaulac decision states that an accused's competence in the majority language does not permit the derogation of his/her language rights, in this case,

there were no language rights from which to derogate which meant that the accused's comprehension was relevant.

[112] R. v. Stadnick, [2001] Q.J. No. 5226.

[113] This summary of the facts of the case is drawn from paras. 1-9 of the judgment.

[114] Stadnick, para. 16.

[115] Ibid., para. 15.

[116] Ibid., paras. 16 and 18. The judge also argued (at para. 19) that the length of time that translating all the evidence would take would do more to compromise the fairness of the trial than would the lack of such a translation.

[117] Ibid., para. 9. While the Crown is normally obligated to provide a précis of the evidence against the accused, the judge ruled in this case that this précis should be translated for the benefit of the accused.

[118] Ibid., para. 20.

[119] Commissioner of Official Languages (2003), 59.

[120] R. v. Charest, [2001] O.J. No. 5736.

[121] This summary of the facts of the case is drawn from paras. 1-17 of the judgment.

[122] Charest, paras. 19-20, 24 and 30.

[123] Ibid., paras. 22-23.

[124] Ibid., paras. 34-35.

[125] Ibid., para. 36.

[126] Ibid., paras. 39-40.

[127] Ibid., para. 35.

[128] Ibid., para. 45.

[129] Ibid., paras. 50-58.

[130] R. v. Schneider, [2003] N.S.J. No. 446.

[131] This summary of the facts of the case is drawn from paras. 1-13 of the judgment.

[132] Schneider, paras. 22-27.

[133] Ibid., para. 31.

[134] Ibid., para. 34.

[135] Ibid., para. 45.

[136] Ibid., para. 44.

[137] R. v. Miljours, [2003] O.J. No. 4136.

[138] This summary of the facts of the case is drawn from paras. 1-17 of the judgment.

[139] Miljours, paras. 17-21.

[140] Ibid., para. 24.

[141] Tractors are not included in the definition of 'véhicule automobile' under the Ontario Highways Code.

[142] Miljours, para. 29.

Chapter Five: The Results of Provincial Court Language Rights Jurisprudence

Introduction

In the previous two chapters, we examined twenty-seven language rights judgments in our four sub-fields from six provinces. While each of these individual cases is interesting and is instructive about language rights interpretation in the provinces in its own right, an examination of the entire body of jurisprudence will provide greater edification. As these twenty-seven cases represent all of the language rights judgments that have been issued since the Beaulac decision (to my knowledge) in our four sub-fields, looking at the whole body of jurisprudence will allow us to determine how the provincial courts have responded to that precedent and how they have developed bilingualism since that time. Therefore, in this chapter, we will look at the results of that jurisprudence to determine what patterns and interpretive trends can be discerned.

Before proceeding to this analysis, however, it is important to keep in mind that not all language rights decisions are of equal value. As precedents and as applications of interpretive approaches, some cases are more important than others in the development of the official bilingualism strategy. For example, a landmark decision from a court of appeal on a critical language rights issue (such as the Lalonde or Baie d'Urfé decisions) will be of much greater importance to the bilingualism scheme than would a decision on a routine traffic issue from a lower provincial court (such as the Lafrance decision). While these qualitative value differences will be taken into account in this analysis to some degree, in the tables presented below, the cases are examined quantitatively with each decision being accorded equal value. While this approach limits our analysis in some ways, attempting to determine the proper weight of each decision would simply be too subjective an exercise to be done with any precision. As well, the quantitative approach used here has the benefit of allowing us to see broad trends and make generalized observations about the language rights jurisprudence. The relative weight of the decisions will, however, be taken into account to a greater extent in the following chapter.

General Observations

Before looking in depth at the quantitative results of the jurisprudence, a number of general facts can be observed when reading the decisions. The fact that is perhaps most

obvious is the number of cases that relate to criminal or provincial charges against a single accused litigant (i.e. cases where individuals were prosecuted by the Crown. Such cases are titled R. v. [litigant's surname]). No less than eighteen of the twenty-seven cases were decided in the context of criminal or provincial offences, with linguistic claims being made by litigants in the process of defending themselves. These offences ranged in severity from murder charges to charges relating to speeding. What this high number of Crown prosecutions of individuals indicates is that the majority of language rights claims were made by individual litigants who were already before the courts (usually facing charges, although some claims not included among those eighteen cases, including Dehenne, Wittenberg and Contenants Industriels, were also made by litigants who were already in court). This means that the majority of claims were not initiated by interest groups with no direct stake in the outcome whose motivations are more political.[1] The fact that the majority of language rights claims were made in order to aid an accused in his/her defence (or by other litigants already before the courts) suggests that language rights are not always being used for political reasons and that these rights are usually called upon in situations where litigants have a personal stake in seeking a favourable court ruling. While it is not that such politically motivated claims are absent (the Charlebois v. Saint John and Morand cases come to mind), such claims were in the minority.

Another related fact that becomes relatively clear when reading the jurisprudence is the degree to which language rights are relied upon by accused litigants (and their lawyers) who have few other recourses to fight their cases (colloquially speaking, the employment of the 'language card' to prevent being found guilty). In several cases, language rights claims were made by accused individuals who appeared to rely on their language as a possible defence (or their only defence) against the charges they faced. Often in such cases the fact that a crime was committed by the accused is undisputed, but the *bilingual* accused in the minority context makes a language claim in an effort to be acquitted or to face a less severe penalty. Most notable perhaps are the cases in which language rights claims were made by the criminally accused. As we saw in the last chapter, linguistic claims were made by individuals accused of such crimes as murder, assault, impaired driving and drug charges. While such claims were often unsuccessful

(the completely unfounded claim made by the accused in the Rose case is one such example), this tactic can be controversial.

In my opinion, it is important to faithfully observe the reasoning of Beaulac, which stated that an accused's "ability" to understand the majority language "is irrelevant,"[2] even in cases where they are clearly guilty. If the linguistic abilities of fluently bilingual litigants are used to dismiss their (constitutionally legitimate) claims for minority language rights, then the door is opened to abuses of the rights of litigants who are less fluently bilingual and whose claims are more pressing and necessary for justice to be served. However, the successful usage of the 'language card' by otherwise guilty litigants has potential to lead to a backlash in the community against the usage of language rights. If too many (ostensibly guilty) accused individuals were acquitted due to language rights, it is possible that Canadians would begin to question these rights and oppose their usage and application in the courts. The mounting of such opposition has potential to create linguistic tensions in Canadian society which could undermine bilingualism and national unity a great deal. While undoubtedly most of the litigants who made language rights claims legitimately needed to avail themselves of their rights, the abuse of such rights has potential to be dangerous for national unity.[3] This use of language rights by criminally accused litigants is another of the more notable, and potentially more controversial, elements of the jurisprudence.

Another general fact about the language rights jurisprudence of the past five years is that a great deal of the cases related to automotive infractions. Nine of the twenty-seven cases involved some sort of automotive violation which ranged in severity from the accused having lapsed car registration to the accused being charged with impaired driving. From these cases, it becomes evident that even seemingly unimportant and routine legal disputes related to traffic infractions can influence official bilingualism. While cases dealing with automotive infractions are not likely to have as great an impact on bilingualism as would other more critical language rights issues (it is unlikely that decisions related to speeding tickets are going to determine the future of the policy), the effects of such traffic cases can have important incremental effects on it. Every language rights decision is important and serves as a precedent for future decisions. Therefore, as

the many automotive cases illustrate, even minor and seemingly insignificant language rights issues can be important to some degree for the development of bilingualism.

Examining the Number of Cases by Various Criteria

To best determine the results of the language rights jurisprudence on our four sub-fields, a quantitative presentation of this jurisprudence is necessary. As a beginning point for such an analysis, an examination of the number of cases would be useful. Our first table illustrates the number of cases decided each year since May 20th 1999, the date of the release of the Beaulac decision.

Table 5.1 Number of Cases by Year

Year	Number of Cases	Percent (%)
1999	7	25.9%
2000	5	18.5%
2001	5	18.5%
2002	4	14.8%
2003	5	18.5%
2004	1	3.7%
Total	27	100.0%

This table illustrates that the frequency of language rights cases decided by provincial courts in our four sub-fields has been relatively consistent from year to year. While seven cases were decided in the more than seven months remaining in 1999 after the release of Beaulac, five cases were decided the following year and similar numbers of cases were decided each subsequent (full) year. The only possible exception is 2004 which, so far, has seen only one language rights case decided, although at the time of writing, the year is not nearly over. This table suggests that the number of language rights disputes in provincial courts has been relatively similar in each of the last five years. This could indicate that external factors such as political developments have had a minimal impact on the frequency of such disputes. A greater impact by political events and policy developments may have led to a more erratic frequency of such cases.[4]

A very important statistic, the number of cases by sub-field, is provided in the next table.

Table 5.2 Number of Cases by Sub-field		
Sub-filed	Number of Cases	Percent (%)
Bilingual Government Services	4	14.8%
Municipal Bilingualism	1	3.7%
Legislative Language Rights	1	3.7%
Legal Language Rights	21	77.8%
Total	27	100.0%

As this table clearly illustrates, the vast majority of language rights disputes in our four sub-fields have taken place in the field of legal language rights. Indeed, twenty-one decisions, over three-quarters of all the decisions rendered, have come from this field. Bilingual government services, with four cases, was the only other field in which more than one case was decided. With nearly eighty percent of the cases being decided in the legal language rights field, it appears that bilingualism in legal proceedings has been a very controversial issue in recent years and that this sub-field has been one of the key fields in the development of official bilingualism (although the qualitative importance of some of the decisions from the field of bilingual government services may make that field of similar importance to bilingualism's development). This is an important development as it suggests that legal processes themselves have become key arenas for the preservation of linguistic minority communities in Canada.

This fact is surprising in some ways as legal procedures are often assumed to be less controversial and more formal and rational than the procedures of other, more overtly political, institutions.[5] The fact that among our sub-fields, legal rights have been the most commonly disputed suggests that courtroom processes may not be as quiet and uncontroversial as is often assumed. On the other hand, some of the traditionally more public and controversial fields such as legislative bilingualism have been the source of considerably less litigation, which resulted in less public controversy over these issues than might be expected. An important observation that this table allows us to make is that bilingualism and national unity itself may hinge to a greater extent on the actions of judges in courtrooms, rather than on politicians and social forces outside the courts, than many of us had thought. With the number of cases related to legal language rights being so high, the judges have more power as they are more at liberty to control proceedings within the courts than they are to control other language rights issues outside of their

domain. This is a significant finding as it suggests that the political resources of the judiciary on unity matters may be even greater than was formerly understood. Once again, the importance of the judiciary in Canadian politics is underscored.

Another important fact relates to the number of cases decided in each province.

Table 5.3 Number of Cases by Province

Province	Number of Cases	Percent (%)
Nova Scotia	4	14.8%
New Brunswick	6	22.2%
Québec	7	25.9%
Ontario	8	29.6%
Other*	2	7.4%
Total	27	100.0%

* Throughout the tables of this chapter, 'Other' includes Saskatchewan and Newfoundland & Labrador.

Interestingly, this table indicates that the largest number of cases were decided in Ontario. Although officially unilingual, Ontario's language rights (as well as the Criminal Code rights) have clearly provided fertile ground for litigation aimed at the advancement of linguistic equality in that province. The same can be said for another unilingual province, Nova Scotia, in which a disproportionately high number of cases were heard. The fact that an high number of cases were decided in New Brunswick and Québec is less surprising, as a number of unique constitutional language rights apply to those provinces (i.e. the language rights of the *Charter* and of s. 133, respectively).

What is perhaps most interesting about this table is the provinces from which language rights decisions have not come. Only six of the thirteen provinces and territories had language rights disputes decided in their courts and over ninety-two percent of these cases were decided in only four provinces. This concentration of language rights litigation is difficult to explain as there are relatively vibrant official language minority communities in every province and territory in the country. Particularly conspicuous by its absence in the table is Manitoba whose language rights figured so prominently in the Blaikie and Acadiens eras of Supreme Court language rights interpretation. With its constitutionally entrenched language rights and the liberal interpretation of those rights provided by the Manitoba Language Rights Reference, one would assume that francophones in Manitoba would be better represented in recent language rights jurisprudence. The concentration of the majority of the jurisprudence in only four provinces may mean that the language rights of our four sub-fields have simply not been the subject of legal dispute in many of Canada's provinces in recent years.

While it might be an exaggeration to suggest that bilingualism and language rights are less important in these provinces, this concentration of cases does perhaps suggest importantly that (in the last five years, at least) bilingualism has not been as pressing an issue in many parts of Canada as it has been in the original four provinces.[6]

Another interesting table concerns the courts in which the language rights cases have been decided.

Table 5.4 Number of Cases by Court		
Level of Court	Number of Cases	Percent (%)
Provincial Court	6	22.2%
Superior Court	14	51.9%
Appeal Court	7	25.9%
Total	27	100.0%

This table suggests that the final decisions[7] on the language rights cases in our four sub-fields have generally been decided in the higher courts of the provinces. Indeed, over one quarter of the cases were decided by courts of appeal, the top court in each province. This suggests that the higher provincial courts, the courts that generally have the greatest authority, have been the ones that have decided the majority of the language rights cases. In addition, as the judges of both the superior and appellate courts are appointed by the federal government,[8] this table indicates that federal appointees have decided a majority of the language rights cases in this study. With twenty one of the twenty seven cases (77.8%) being heard by federal appointees, one might assume that decisions favourable to the development of language rights and bilingualism would generally be rendered. As we will see later in this chapter, this has not always been the case. As this and the other tables we have already examined illustrate, there are a number of interesting political dynamics at play in the language rights jurisprudence of the past five years.

How the Language Rights have been Interpreted

Without question, the most important issue in this examination is how liberally or restrictively the language rights of our four sub-fields have been interpreted since the Beaulac decision mandated a liberal and purposive approach to such rights 'in all cases.' As was noticeable in the last two chapters and as is made clear by the following table, the record of the courts in upholding this precedent has been less than impressive.

Table 5.5 Number of Cases by Category			
Category	Number of Cases	Percent (%)	Percent (%) of Controversial Cases
Highly Restrictive	7	25.9%	33.3%
Somewhat Restrictive	7	25.9%	33.3%
Expected	6	22.2%	Not Applicable
Somewhat Liberal	5	18.5%	23.8%
Highly Liberal	2	7.4%	9.5%
Total	27	100.0%	100.0%

As the table illustrates, provincial courts have not consistently applied the liberal and purposive approach ordered by the Supreme Court and in fact have often been quite restrictive in their interpretation of language rights. According to the table, over half of the twenty-seven cases were decided in a restrictive fashion, with seven of those cases decided in highly restrictive fashion. On the other hand, only seven cases were decided liberally which represents only half of the number of cases decided restrictively. When only those cases in which a controversy that required a creative resolution to ambiguous language rights provisions are considered (i.e. when the six expected decisions are removed from the calculations), the jurisprudence appears even more restrictive. Of the controversial cases, no less than two-thirds were decided restrictively.

This table is interesting for a number of reasons. It reveals that in over a quarter of the cases in which language rights disputes came before the provincial courts, the courts interpreted the rights somewhat restrictively, relying on ambiguity in the text to decide against the claimants. Against the orders of Beaulac, these decisions failed to interpret the rights liberally which undermined the linguistic protections afforded by the provisions. Another quarter of the cases went further and actually decided the claims in an highly restrictive fashion, often by failing to apply language rights at all in situations where they clearly should have been applied, or by relying upon and reinvigorating overturned precedents. These decisions are most at odds with the Beaulac precedent and often directly contradict it. They are also most injurious to the bilingualism regime in Canada. While six cases were relatively uncontroversial, with relatively clear decisions to be made by the courts in applying relatively clear and unambiguous language rights provisions, another seven decisions were liberal. In five of these liberal decisions, the courts interpreted the rights somewhat liberally, using ambiguity in the provisions and a

purposive approach to decide the claims in favour of the litigant, as is required by Beaulac. In the other two decisions, language rights were interpreted highly liberally with the courts creating new obligations for the state, using a purposive analysis to significantly advance the frontiers of bilingualism and provide major new protections to official language minorities. However, these liberal decisions were in the minority. The fact that so many of these language rights cases have been interpreted restrictively is, in many ways, a shocking revelation and is the most important finding of this study.

These results signify, among many other things, that the courts of the provinces have not always faithfully followed and applied the Beaulac precedent by which they are bound. Indeed, in many cases they have gone in a completely divergent direction from the precedent. This generally restrictive case law suggests that linguistic equality in Canada may be on less secure footing than originally thought after the release of Beaulac. If the effects of the unwillingness of some courts to follow binding precedent and interpret language rights in a liberal fashion are indeed to undermine the growth and development of bilingualism, as I suspect may be the case, this jurisprudence may significantly damage linguistic equality in Canada. This may lead to increased linguistic tension and conflict in the country, the exact result that policy makers sought to avoid in giving the important national unity role to the courts through language rights.

When examining the relative restrictiveness of the jurisprudence in combination with other variables, a number of additional interesting facts become clear as well. For example, when looking at the results of the jurisprudence by year, we can see that time had a minimal effect on the jurisprudence.

Table 5.6 Category by Year

	Category					
Year	Highly Restrictive	Somewhat Restrictive	Expected	Somewhat Liberal	Highly Liberal	Total
1999	2	1	4	0	0	7
2000	3	2	0	0	0	5
2001	1	0	0	2	2	5
2002	1	3	0	0	0	4
2003	0	0	2	3	0	5
2004	0	1	0	0	0	1
Total	7	7	6	5	2	27

This table tells us that it took a few years before the liberal effects of the Beaulac precedent were felt at all in provincial courts. In post-Beaulac 1999 and in 2000, there

were no liberal decisions, with 2000 being a particularly bad year for language rights claimants. In that year, all five cases were decided restrictively, with three of those being decided highly restrictively. While 2001 and 2003 were considerably better years for claimants, they were separated by 2002 which was another restrictive year. From this data, there are few chronological trends apparent which may indicate that time had little effect on the jurisprudence. Given the restrictiveness of 2002 (and the restrictive start to 2004) we certainly cannot accurately say that the jurisprudence became more liberal with time (as the courts became more familiar with the Beaulac case) as might be expected. While it is clear that it took the courts a few years to become slightly less hostile to language claims after the release of Beaulac, a clear trend toward increased liberalism with increased time since the release of Beaulac cannot be said to exist.

It is also difficult to discern trends when examining the results by sub-field, due to the preponderance of legal language rights decisions.

Table 5.7 Category by Sub-field

	Category					
Province	Highly Restrictive	Somewhat Restrictive	Expected	Somewhat Liberal	Highly Liberal	Total
Bilingual Government Services	1	0	1	1	1	4
Municipal Bilingualism	1	0	0	0	0	1
Legislative Language Rights	0	0	0	0	1	1
Legal Language Rights	5	7	5	4	0	21
Total	7	7	6	5	2	27

While conclusive observations are difficult to make from this table, it does suggest that legal language rights have been interpreted comparatively[9] restrictively. Twelve of the twenty-one legal language rights decisions (57.1%) were interpreted restrictively, five of which were interpreted highly restrictively. Only four (19.0%) of those twenty-one cases were decided liberally, all of them somewhat liberally.[10] In contrast, litigants appeared to fare somewhat better when making claims for government services. Only one of the four bilingual government services cases was decided restrictively with two decided liberally, one for each liberal category. For the legislative and municipal categories, it is impossible to make conclusive observations as only one case was decided in each.

What this table does indicate is that the rights of the sub-field in which the highest number of cases were decided were interpreted fairly restrictively, which suggests that the area of bilingualism which had the greatest opportunity for development was greatly

undermined through narrow jurisprudence. It was in this field that the courts appear to have been most hesitant to advance bilingualism which was unfortunate for language rights claimants as this was the field in which the majority of their claims were made. On the other hand, it appears to be the case that language rights claimants received greater generosity from the courts when making claims to government services (at least, compared to legal language rights claims), although the low numbers of cases in this field make it difficult to draw definitive conclusions. If this field is indeed interpreted more liberally, this is an important finding about the development of bilingualism. As indicated in chapter one, bilingual government services are critically important to the survival of linguistic minorities as they allow the group to maintain use of its language in dealing with government agencies. If the rights to such services continue to receive a more generous interpretation from the courts, this field could become an important growth area for bilingualism which would have valuable salutary benefits for the linguistic minority communities. The (seemingly) more generous interpretation of bilingual government services rights and the potential of these rights to be a major area of growth for official bilingualism are among the key findings of this study.

Highly instructive is the table displaying the level of restrictiveness and liberality by province.

Table 5.8 Category by Province

	Category					
Province	Highly Restrictive	Somewhat Restrictive	Expected	Somewhat Liberal	Highly Liberal	Total
Nova Scotia	0	1	1	2	0	4
New Brunswick	2	2	1	0	1	6
Québec	3	3	0	1	0	7
Ontario	2	1	2	2	1	8
Other	0	0	2	0	0	2
Total	7	7	6	5	2	27

This table allows us to make a number of important observations. Perhaps most striking is how restrictive the courts of Québec have been in their jurisprudence. In that province, six of the seven cases (85.7%) were decided restrictively, including three highly restrictive decisions. Only one case (14.3%) was decided (somewhat) liberally. These are telling statistics which imply that the judiciary in Québec has not been very accepting of the bilingualism provisions by which the province is bound (particularly s. 133 and s. 530). This likely means that the project to strengthen the French language in Québec is

well-supported by the Québec judiciary which has been fairly antagonistic to the advancement of the linguistic rights of anglophones recently. While Québec is in many ways the province that has been most generous to its linguistic minority since confederation, that minority appears to have encountered a relatively hostile judiciary in recent years in the sub-fields of this study, in spite of Supreme Court precedent.

Also interesting are the mediocre jurisprudential results from New Brunswick. In that province, four of the six decisions rendered were restrictive, including two highly restrictive decisions. While one of the highly liberal decisions came from New Brunswick, liberal judgments represent only 16.7 percent of the cases decided in that province. This is surprising for New Brunswick as it is the only province in Canada which is officially bilingual. With an extensive language rights regime in the province and a provincial government generally in support of the advancement of bilingualism (although not always, Mario Charlebois would remind us), one would assume that New Brunswick's jurisprudence would be more generous to minority language litigants and would lead the country in the extension of bilingualism.[11] The surprisingly restrictive case law from New Brunswick is one of the key findings of this study as it indicates that language rights jurisprudence has even been restrictive in the province which is generally most favourable to the advancement of linguistic equality.

The provinces which appear to be most liberal (rather, least restrictive) in their jurisprudence are Ontario and Nova Scotia. In Nova Scotia, half of the four judgments rendered were decided in somewhat liberal fashion, with only one judgment being decided (somewhat) restrictively. Nova Scotia is thus the only province where more decisions were decided liberally than restrictively. Ontario's jurisprudence is evenly split, with three (37.5%) decisions being decided liberally and another three being decided restrictively (with two decisions judged in expected fashion). However, two of the three restrictive decisions were highly restrictive while only one liberal decision was highly liberal. Therefore, it appears that the Ontario judiciary's approach to bilingualism has been relatively balanced, perhaps weighted slightly toward a restrictive approach. This jurisprudence is reflective of the Ontario government's cautious and incremental development of bilingualism in the province. However, it is interesting that in the province with the largest francophone minority in Canada the judiciary has not ruled

more decisively in favour of bilingualism. With the large number of francophones in the province, the important role that the province plays in national unity and the importance of Ontario in the Canadian judiciary, the failure of Ontario judges to apply Beaulac as consistently as they could have is significant. A more clearly liberal application of the precedent could have done more to advance bilingualism in Canada.

When looking at the results of the jurisprudence by court, a surprising lack of support for bilingualism in the federally-appointed judiciary is apparent.

Table 5.9 Category by Court

	Category					
Court	Highly Restrictive	Somewhat Restrictive	Expected	Somewhat Liberal	Highly Liberal	Total
Provincial Court	1	1	3	1	0	6
Superior Court	3	4	3	4	0	14
Appeal Court	3	2	0	0	2	7
Total	7	7	6	5	2	27

Contrary to what might be expected, this table indicates that the federally appointed judiciary (the judges of superior and appellate courts) has decided a greater proportion of cases in restrictive fashion than has the provincially appointed judiciary.[12] Indeed while only one-third of final cases decided by provincially appointed justices were decided restrictively, twelve of twenty-one final cases (57.1%) were restrictively decided by the federally appointed judiciary.[13] Furthermore, while less than seventeen percent of cases decided by provincial appointments were decided highly restrictively, nearly twenty-nine percent of cases decided by federal appointments were decided in that way. Also interesting from this table is the fact that in spite of deciding over half of the overall cases, the superior courts did not render any highly liberal decisions. Nor did the provincial courts, which, not surprisingly, tells us that significant judicial innovation on language rights was only undertaken by courts of appeal.[14]

This table says a great deal about the federal government's appointment of superior and appeal court justices. As we saw in chapter one, Ottawa has an important ability to affect public policy through its power to appoint the majority of judges in Canada, including the judges of the superior and appellate courts of the provinces. One might assume that the federal government would utilise this important lever of power to try to reinforce its most important policy priority, national unity. However, with less than thirty percent of the cases before federally appointed judges being decided liberally and with

well over half of the cases being decided restrictively, the federal government appears to have failed in a number of cases to appoint judges who would advance bilingualism when given the opportunity. Particularly striking are the results for the courts of appeal, the most important provincial judicial appointments made by the federal government. Of the seven cases coming before such courts, five were decided restrictively, including three which were decided highly restrictively. These results suggest that the federal government should take greater care to appoint bilingualism-friendly judges to the provincial bench if it hopes to see the judiciary play the national unity role that Ottawa set out for it.

Our final table provides information on the interpretation of language rights by both province and court.

Table 5.10 Category by Province and Court

		Category					
Province	Court	Highly Restrictive	Somewhat Restrictive	Expected	Somewhat Liberal	Highly Liberal	Total
Nova Scotia	Provincial Court	0	0	0	0	0	0
	Superior Court	0	0	1	2	0	3
	Appeal Court	0	1	0	0	0	1
New Brunswick	Provincial Court	1	0	1	0	0	2
	Superior Court	1	2	0	0	0	3
	Appeal Court	0	0	0	0	1	1
Québec	Provincial Court	0	1	0	0	0	1
	Superior Court	0	1	0	1	0	2
	Appeal Court	3	1	0	0	0	4
Ontario	Provincial Court	0	0	0	1	0	1
	Superior Court	2	1	2	1	0	6
	Appeal Court	0	0	0	0	1	1
Other	Provincial Court	0	0	2	0	0	2
	Superior Court	0	0	0	0	0	0
	Appeal Court	0	0	0	0	0	0
	Total	7	7	6	5	2	27

As this table illustrates, the success that official language minority claimants had often depended on which court heard their case. For example, litigants often encountered a poor reception to their language rights claims in the Court of Queen's Bench of New Brunswick, that province's superior court. All three cases heard by that court were decided restrictively, with two decided somewhat restrictively and one decided highly restrictively. Again, the fact that the superior court of New Brunswick would be so hostile to language rights claims is surprising, given the province's officially bilingual

status and the fact that its judges are appointed by Ottawa. The Ontario Superior Court of Justice was similarly restrictive, with three of the six cases rendered by that court decided restrictively and with only one case decided liberally. Of those three restrictive decisions, two were highly restrictive. Similar to the case in New Brunswick, this is somewhat confusing in light of the general acceptance of bilingualism and desire for the maintenance of national unity which is often associated with Ontario.[15] Surprisingly, the court with the most liberal record of language rights interpretation (among those that decided more than one case) was the Nova Scotia Supreme Court, that province's superior court. Of the three cases heard there, two were decided liberally and none was decided restrictively. While the number of cases decided by that court is small, it is interesting that it appears to have a more liberal record than its counterparts in the traditionally more bilingualism-friendly provinces of Ontario and New Brunswick. With the superior courts of even those two provinces restrictive in their language rights interpretation, it is no wonder that the Beaulac approach has generally received such a poor reception in provincial courts.

The court that is perhaps most remarkable in its language rights interpretation is the Québec Court of Appeal. That court issued an opinion on the majority of language rights disputes heard in Québec courts (four of seven cases) and it was unfailingly restrictive in its interpretation. Indeed, of the four cases it heard, three were decided in highly restrictive fashion while one was decided somewhat restrictively. This is an astonishing fact. The Québec Court of Appeal is one of the most important courts in Canada, particularly in relation to national unity concerns. This court is at the top of the judicial apex in the province where linguistic tensions are most acute. Intuitively, one might assume that the federal government would take care to appoint judges to this court who would interpret language rights in a manner consistent with the advancement of bilingualism and preservation of national unity. However, the evidence suggests that language rights claimants received a more hostile reception in this court than in any other court in Canada. It was willing to permit the denial of the constitutional language rights of witnesses in two cases and relied on the political compromises doctrine in two others, all to reject the claims of minority language individuals (in some cases unnecessarily) in ways that contradicted the orders of Beaulac. The court also sent a message to the lower

courts in the province that the denial of language rights (often for less than convincing reasons) was permissible. Why this court continually insisted on interpreting language rights cases in such a restrictive fashion is unknown. What is known, however, is that the continuation of such a narrow approach to language rights from the most important court in Québec has potential to heighten linguistic tensions in the province which could be disastrous for national unity. This extreme restrictiveness of the Québec Court of Appeal is one of the most important developments in the language rights jurisprudence of the past five years.

The results of this table are highly indicative of the difficulties for the development of bilingualism in the provincial courts in recent years. The Ontario and New Brunswick superior courts and the Québec Court of Appeal are among the most important courts in the "bilingual belt"[16] provinces. These three provinces have the largest official language minority communities in Canada and are the provinces which have been least hostile to their linguistic minorities (at least in recent times). The courts of those provinces are therefore some of the most important courts in provincial language rights jurisprudence which can play a critical leadership role in the development of the jurisprudence. The fact that some of the crucial courts of these provinces have been so unreceptive to the claims of official language minority litigants, even in the face of binding Supreme Court precedent, suggests that the strategy to advance linguistic equality through the courts may not be as successful as many had hoped. While the restrictiveness of the superior courts of Ontario and New Brunswick is mitigated somewhat by the more liberal precedents established by those provinces' courts of appeal, the narrow jurisprudence of the superior courts is still an important development which severely limits the growth of bilingualism in Canada. The results of this table thus paint a rather bleak picture of the development of linguistic equality in the past five years.[17]

Conclusion

As the above tables make clear, the language rights jurisprudence of the past five years has not been very encouraging for those who seek the advancement of bilingualism. As we have seen, the courts have generally interpreted language rights more restrictively than liberally. This conclusion is a critical revelation about the effects of provincial court jurisprudence on bilingualism in Canada and is especially shocking in light of the fact

that the Beaulac precedent mandated a liberal interpretation of language rights 'in all cases.' Particularly interesting are the facts that the federally appointed judiciary has been fairly restrictive, as have the courts of Quebec, New Brunswick and, to a lesser degree, Ontario. As well, the courts have been exceptionally restrictive when interpreting legal language rights which is the sub-field which has been the most frequently litigated (and is therefore of great importance) in recent years. In my mind, these results indicate that bilingualism has not been significantly advanced in Canada in the five years since the release of the Beaulac decision and may even have been slightly retarded. While it is perhaps too early to determine what final effects the lack of progress toward linguistic equality (perhaps even movement toward inequality) will have for national unity, this lack of progress has potential to have vital effects on Canadian unity and society. This subject will be explored further in the final chapter.

NOTES

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[1] At 25, Morton and Knopff (2000) chastise what they refer to as the 'Court Party,' including 'national unifiers' such as official language minority groups (59-63), for "seek[ing] to constitutionalize policy preferences [through the courts] that could not easily be achieved through the legislative process." In our four sub-fields, it appears that the authors are mistaken, as the majority of the 'national unifier' litigants in this study pursued not larger political objectives, but their own personal interests. Indeed, the litigants of this study could be described, using the authors' own words, as "the individual litigant who employs constitutional arguments primarily as a means to protect his own liberty…and for whom the broader policy consequences of a judicial opinion are unimportant (26)." Therefore, the argument by scholars such as Morton and Knopff that language rights are primarily used for political purposes to advance policy objectives seems to be made questionable by this study.

[2] Beaulac, para. 45.

[3] This problem could probably be avoided if judges were to grant retrials, rather than outright acquittals, in cases where language rights violations had occurred, as was the case in the Mackenzie case.

[4] For example, the passage of Bill 101 in Québec led to a significant spike in the number of language rights cases in that province in the late 1970s and early 1980s.

[5] As we saw in chapter four, Magnet (1995) at 242 feels that "[c]ourts are expected to channel political conflict into legal procedure."

[6] If this is true and bilingualism has indeed been a less pressing issue in some parts of Canada in recent years, the benefits or drawbacks for the bilingualism regime are difficult to determine. On the one hand, this might mean that there has been a relatively harmonious relationship between the two language groups in these provinces (perhaps the lack of language rights disputes in Manitoba suggests that after the tumultuous 1980s, the two language groups have found a workable and amenable compromise and that language disputes are less frequent and heated). On the other hand, it could suggest that the majority communities have simply consolidated their positions and that the linguistic minorities are too weak to fight difficult language disputes.

[7] With the exception of the Peters case, whose final decision is, again, considered in this analysis to have been rendered by the Québec Court of Appeal.

[8] These judges are appointed pursuant to s. 96 of the *Constitution Act, 1867*. Provincially appointed judges are appointed pursuant to s. 92(14) of that *Act*.

[9] All of the conclusions drawn related to this table are generally speculative, due to the low number of cases in the other sub-fields, making cross-field comparison difficult.

[10] Indeed, a finer analysis of the jurisprudence reveals that rates of restrictiveness on legal language rights for the federally appointed judiciary and the courts of Ontario and New Brunswick were higher than were the rates when all fields were considered together.

[11] It is possible that with a government which is sympathetic to bilingualism in power in the provincial legislature (presumably working toward the advancement of bilingualism through legislative means) the judiciary in New Brunswick have chosen to subscribe to the political compromises approach outlined by Justice Beetz in Acadiens. With a bilingualism-friendly government, perhaps the judiciary is generally willing to allow the government to proceed at its own pace in developing the scheme by treating bilingualism issues with restraint. While this is certainly better for linguistic minority communities than deferring language rights issues to governments which are not sympathetic to bilingualism, restraint in the interpretation of language rights is still in violation of the orders of Beaulac.

[12] Again in this context, comparisons between the courts are difficult due to the relatively small number of cases decided in provincial courts.

[13] It should be noted, however, that while only seventeen percent of provincial court decisions were decided liberally, nearly twenty-nine percent of cases decided by federally appointed judges were decided liberally. This indicates that comparatively more federal judge decisions were rendered restrictively, but that comparatively more federal judge decisions were decided liberally as well. The high number of cases decided expectedly by provincially appointed judges might explain this seeming paradox.

[14] Oddly, while two cases from provincial courts of appeal were decided highly liberally, none were decided somewhat liberally.

[15] At 61, Knopff and Morton (2000) refer to "Ontario and New Brunswick...[as] Trudeau's two original constitutional allies from the 1980-81 Chartermaking process."

[16] Joy, 9.

[17] The fact that the judges of these three courts are appointed by the federal government suggests that Ottawa has failed to adequately support its national unity strategy through its appointments in some of the most crucial courts in which to do so.

Chapter Six: Conclusions

Policy Observations

Given what we have observed in this study, the most important conclusion we can make is that the language rights of our four sub-fields have not been effectively used by the courts to reinforce the official bilingualism strategy which has been seen as so important to national unity in Canada. With the inconsistent interpretation of these rights by the Supreme Court followed recently by a fairly restrictive interpretation of them by the provincial courts, the judiciary has generally failed to meaningfully advance linguistic equality. While there have been areas in which the courts have advanced bilingualism, most notably the provincial courts' possible expansion of bilingual government services rights, the general trend has been that the courts have not done so effectively. The result of this failure is that these rights and the bilingualism scheme itself have been weakened to some degree and that the courts have done little, if anything, to strengthen Canadian unity in recent years. This means that one of the most important Canadian policy objectives of the last thirty-five years has not been realized and that the strategy underlying the passage of the language rights and official bilingualism has, at least as far as these sub-fields are concerned, been a failure. This failure could have vital consequences for national unity in the future.

This is critically important. Since the late 1960s and particularly since the passage of the *Charter*, language rights have been a crucial element of the policy strategy to maintain national unity. Ottawa purposefully legislated a number of language rights (and supported the provinces in doing likewise) in order to create a legal regime which sought to foster linguistic equality in Canada. The judiciary (much of which is appointed by Ottawa) was supposed to uphold these rights by interpreting them expansively in order to engender a greater sense of national belonging regardless of language and to make Canada equally hospitable to both French- and English-speaking Canadians. As we have seen in this study, however, the courts have, for the most part, fallen short in doing so in our sub-fields leading to continued linguistic inequality. Indeed, the refusal of the judiciary to meaningfully advance linguistic equality in all cases has damaged the national unity strategy as it relates to these sub-fields, a development which bilingualism advocates would see as having potential to assist the Québec sovereignty movement that

threatens to destroy Canada. The actions of the judiciary may thus have cast new doubt on the long-term unity of the Canadian federation. The resulting ramifications will be significant for many, not least of whom are the federal and provincial policy makers who depend upon language rights as one of the few, and by far the most important, unity strategies. The fact that these rights have not been interpreted the way these policy makers would have hoped suggests that these people will likely need to develop a new strategy or significantly reinforce the current language rights scheme. The failure of the judiciary to use the language rights of our sub-fields to effectively strengthen the strategy to reinforce national unity is thus one of the most important developments in Canadian politics in recent years.

While the judiciary cannot alone be blamed for the failure of the strategy, it has clearly played an instrumental role in the failure. The fact that the actions of judges led, in large part, to the breakdown of these elements of the strategy underlying the policy of bilingualism makes it clear that the courts are vitally important players in the public policy process. Through their authority to interpret legislation and the constitution, the courts possess a political resource which provides them with tremendous power. This power allows them to exert a great deal of influence over the development and execution of public policy. The courts can strengthen, water down, or even significantly alter a policy which gives them the ability to dramatically effect the direction and scope of public policy, regardless of the intentions of the legislatures. In exercising their power, the courts may pursue their own agendas which sometimes leads to their being very poor at carrying out the policy orders of legislatures (as we have seen in this study). As such, the courts' power in the policy process can almost be said to approach that of the policy-making legislatures. The power held by the Canadian judiciary is a fact that political scientists have only recently come to understand as the advent of the *Charter* and judicial review have brought their substantial resources in public policy matters into bold relief.

Nowhere is the power of the courts in the policy process more evident than in this study where we have seen that the judiciary was able to weaken aspects of a policy (i.e. those aspects of the official bilingualism policy that were of concern to us in this study) which was one of the highest priorities of Canadian policy makers. Official bilingualism and the language rights associated with it were legitimately passed into law and in some

cases constitutionalized by a broad consensus of policy makers (both in Ottawa and in the provinces), all for the imperative purpose of maintaining the integrity of Canadian unity. In spite of the significant priority attached to this policy, however, the courts have exercised their power by not always interpreting it the way its advocates would have hoped which has resulted in the failure of the policy to fulfill its strategic purposes in our sub-fields. As we observed in this study, it is not just higher courts like the Supreme Court that exercise such power in the policy process as provincial appellate courts and even lower trial courts had an important effect on the failure of the bilingualism strategy in these fields as well. Our confirming the fact that the judiciary wields tremendous power in Canadian public policy is another of the most important conclusions of this study.

While the power of the courts in public policy is unquestionable, the way they have exercised their power in relation to the policy of bilingualism is somewhat surprising. It is surprising in part because one might assume that the courts would interpret the policy liberally in order to avoid confrontation with the legislatures on an issue which is of such high priority to policy makers. This is particularly so as it is an issue in which the courts have a vested interest (i.e. maintaining the integrity of the Canadian state and state apparatus). It is also surprising because many of the judges who have interpreted the bilingualism policy so restrictively are appointed by the federal government. As we saw in chapter one, these judges might be expected to be relatively ideologically in-line with the federal government which appointed them, particularly on a policy issue as important to Ottawa as official bilingualism. As we saw in the last chapter, however, the evidence for provincial court judges indicates that federally appointed judges have generally been more restrictive in their language rights interpretation than have provincially appointed judges. The fact that judges appointed by Ottawa have not advanced bilingualism to a greater extent suggests that the federal government has not adequately supported its official bilingualism policy in the exercise of its judicial appointment power. This fact is in many ways incomprehensible. Why would Ottawa not take the greatest care to use its power over judicial appointments to reinforce the strategy that aims to maintain the very integrity of the Canadian state? While it is possible that there are conspiratorial factors at play that may explain this (discussed later), on the surface, Ottawa's failure to adequately

support its national unity strategy through judicial appointments seems to be an enormous oversight and is another important finding of this study.

Other Observations

While the failure of language rights as a national unity reinforcing strategy and the related policy considerations are without doubt the most important revelations of this study, a number of other critical facts have been exposed as well. One of the most important of these is that the Acadiens approach clearly lives on in provincial language rights jurisprudence. In spite of the clear repudiation of it by the Supreme Court in Beaulac, the Acadiens approach was not easily exorcised from the minds of provincial court judges. The political compromises doctrine and other tenets of the approach were directly or implicitly relied upon in a number of provincial court decisions. This indicates not only that the courts have allowed this approach to remain viable, but also that they have, in many instances, failed to apply the precepts of the Beaulac approach which is the most recent language rights precedent and is therefore the most current version of the law. I view this as a serious breach of Canadian legal convention.

In his explanation of the Canadian legal system and of the importance of precedent and the principle of *stare decisis*[1] (which he describes as "the basis of our common law system"[2]) to that system, Gerald L. Gall writes: "under...stare decisis, the decision of a higher court within the same jurisdiction acts as binding authority on a lower court within that same jurisdiction."[3] Writing specifically of the Supreme Court, Russell points out that "its decisions are binding on all the courts below."[4] As Beaulac explicitly overturned the precedential value of the Acadiens precedent, the common law has evolved to a place where that decision now represents the law at the current time while Acadiens does not. This means that the Acadiens approach is no longer binding. In my mind, the Beaulac approach should, therefore, have been enforced by the provincial courts without exception. By mandating that language rights must be interpreted purposively "in all cases" (a phrase which it underlined), the Supreme Court made an effort to emphasize that its new Beaulac approach should be enforced and should not be distinguished by the lower courts. While it is common in constitutional adjudication for courts to be selective in applying valid legal doctrines,[5] it is not permissible for courts to choose to enforce a precedent which has been explicitly overruled and stricken from the realm of binding

common law by the highest court in the nation. In my view, the provincial courts were obliged to follow and enforce the Beaulac approach and their failure to do so in several instances serves as an example of political, result-oriented decision-making and can be said to be a violation of one of the most important principles of the Canadian legal system.

The fact that the Beaulac approach was ignored in a number of cases by the provincial courts in favour of the sustained application of the Acadiens approach is another fact that is very instructive about the courts in Canada. While we have already discussed the power possessed by the judiciary in policy matters, the fact that the Acadiens approach has been (illegitimately, in my opinion) rejuvenated in some ways by the provincial courts is indicative of the courts' discretion in interpreting precedent. It illustrates that courts are not always willing to properly follow precedent in their interpretation of policy provisions, no matter how clear and authoritative the precedent and no matter how explicit the overturning of the previous precedent. Indeed, so powerful are the courts in interpreting the case law that they are sometimes willing to make use of inappropriate or overturned precedents while ignoring others in order to arrive at the results they seek. That such tactics can be used to undermine important constitutional provisions such as language rights is a disturbing revelation about the behaviour of the courts. The courts' selective application of precedent, combined with their power in policy matters, illustrates again how important an institution the judiciary is in Canadian politics.

Another (related) observation that can be made is that the language rights jurisprudence has developed very little in recent years. There have been few substantial advances of language rights since Beaulac as restrictive provincial court jurisprudence has stunted their growth in most cases. One of the ways in which this has been seen is in the lack of consistent development of some of the jurisprudential principles and doctrines that have been put forth by language rights claimants and advocates. For example the 'protection of minorities' principle of the Secession Reference has been interpreted in a very uncertain and inconsistent fashion. While this principle has been applied to advance language rights in some cases (such as Lalonde and Charlebois v. Moncton), in others, it has been rejected as being inappropriate (such as in Baie d'Urfé and Mackenzie).[6] Such

inconsistency leads to uncertainty in the jurisprudence which does little to advance language rights and bilingualism (as the effect of the Supreme Court's inconsistent language rights jurisprudence on provincial courts exemplifies). As such, the development of the language rights suffers. Another principle which has not been advanced by the courts is the so-called 'ratchet principle' which has been rejected by the courts of appeal of four provinces. While such a rejection may be warranted by the text of the constitution, it nevertheless serves as another example where the courts have failed to take the opportunity to advance linguistic equality. With the failure of the courts to consistently interpret these and other jurisprudential principles in ways that are beneficial to language rights claimants, language rights have been advanced very little and linguistic minorities have secured few significant jurisprudential improvements.

This lack of development of the jurisprudence has a number of important ramifications, particularly for official language minority communities. The failure of the courts to significantly advance official bilingualism has resulted in continued linguistic inequality in Canada which leads to continued hardships for these communities. These hardships are felt in a myriad of ways. For example, a right to listen or be understood in the official language of the litigant's choice still does not exist in many non-criminal judicial proceedings. The fact that minority language litigants have the right to speak but not to listen or be understood in the official language of their choice in a number of courts is, in my opinion, a ridiculous state of affairs which is based entirely on politics rather than on principle or common sense. This illogical scenario leads to additional difficulty for the minority language litigant in whose judicial proceedings the majority language is often used, despite the clear intentions of the language rights provisions. One is reminded of the words of former Chief Justice Brian Dickson who, in his dissent in Acadiens, wondered: "What good is a right to use one's language if those to whom one speaks cannot understand?"[7] Only through static and literal judicial reasoning, as well as complete ignorance of the purposes of the language rights provisions, would such a state of affairs be allowed to continue over 135 years after the original language rights were passed. The perpetuation of such static and narrow judicial interpretation creates additional burdens for official language communities in this and many other ways, some of which can be highly injurious to the long-term survival of the community. A more

substantial jurisprudential development of the language rights could have ameliorated some of these linguistic inequalities which could have led to a more secure future for the minority communities.

Another of the observations that can be made from this study relates to the importance of legal language rights. Not only have a number of important precedents been established in this sub-field (such as Beaulac) but, as we saw in the last chapter, more than three-quarters of the cases we studied were legal language rights cases. This demonstrates that among our sub-fields, issues relating to procedures in courtrooms were highly important in the evolution of bilingualism in the last five years. Given this fact, I would suggest that legal language rights are clearly among the most important rights dealt with in this study. Although not all of the judgments rendered in this field were highly significant in terms of the qualitative weight of the case or the impact of the decision (the decisions related to bilingual government services rights may have been more significant in this respect), the volume of cases in this field is indicative of the fact that these rights form the basis for a great deal of linguistic controversy and are thus highly important to the future of the bilingualism strategy. The critical importance of legal language rights to the bilingualism policy regime is another of the most significant findings of this examination.[8]

Before leaving the discussion about the observations we have made, observations which have often related to the restrictive nature of the jurisprudence, it is important that the liberal jurisprudence be given proper regard. While the case law was certainly more restrictive than liberal, it was not entirely restrictive and it may appear more bleak than it actually is. Over one-quarter of the cases were decided in liberal fashion, which indicates that in one out of every four linguistic disputes, language rights were advanced. While this certainly does not represent an impressive execution of the Supreme Court's Beaulac orders, it is important to remember that not all language rights claimants have lost their cases. Perhaps more important, however, is the relative weight of some of these liberal opinions. As was indicated in the previous chapter, not all judgments are of equal value and language rights claimants have scored some valuable victories in recent years. For example, the Lalonde and Charlebois v. Moncton cases, both of which were decided in highly liberal fashion by respected provincial courts of appeal, are very important

decisions. These cases not only significantly advanced the state of language rights in Ontario and New Brunswick, respectively, but also set precedents for the lower courts which provided extremely liberal interpretations of language rights. Similarly, the Doucet judgment, while not decided by an authoritative Court of Appeal, still contained a liberal expansion of the scope of language rights in Nova Scotia which could serve as a basis for a further expansion in the future. Highly significant cases such as these are often much more important to the development of bilingualism than are some of those that were decided restrictively, such as some of the traffic cases. The precedential value of these and other important liberally decided cases may have advanced the frontiers of bilingualism to a greater extent than it would appear which may indicate that language rights claimants have fared better than the quantitative analysis of the jurisprudential results indicates.

In addition, the fact that cases related to bilingual government services were interpreted more liberally than restrictively is another reason for hope as these rights are very important to the survival of linguistic minority communities. With language claimants faring relatively well in the few cases that were decided in this area, bilingualism has been developed in a more generous and liberal fashion in this field which may indicate that it will see further expansion in the future. Therefore, when the liberal jurisprudence is properly considered, I would suggest that official language minorities and other bilingualism supporters should not despair completely, as there may be more hope for an expansion of bilingualism and linguistic equality than is apparent. However, the interpretation of the courts was still much more restrictive than liberal which is a disturbing development that has potential for drastic national unity consequences.

Reasons, Responsibility and Solutions

As the development of bilingualism has been somewhat stunted in recent years by a narrow judicial interpretation of language rights, gaining a fuller understanding of the reasons underlying this narrow interpretation may help in determining future directions for official bilingualism in Canada. Perhaps the most important question to be answered in this pursuit is why the provincial courts have been so restrictive and narrow in their

interpretation. While answers to questions such as these are purely speculative, I suspect that the inconsistent jurisprudence of the Supreme Court led to the restrictiveness.

Since the passage of official bilingualism in 1969, the Supreme Court has developed two separate and oppositional jurisprudential approaches to the language rights of our sub-fields. While some variation should be expected, particularly over such a long period of time, the fact that these approaches were totally inconsistent and in some ways completely contradictory likely made it difficult for the lower courts to follow the instructions of the top Court. In light of this poor guidance from the Supreme Court, the lower courts of the provinces, particularly the superior and provincial courts, may have decided to avoid the kind of bold judicial innovation and liberal decision making that was needed to advance official bilingualism in the four sub-fields of this study. In the absence of clear direction from the Supreme Court to do otherwise, these courts may simply have felt that it was necessary to be restrained on the important policy issues before them until their judicial superiors plainly permitted a more expansive approach. In addition, these courts of the provinces have limited jurisdiction and are unaccustomed to dealing with critical policy issues such as official bilingualism and national unity without concrete direction from the Supreme Court. Rarely are they called upon to engage in the kind of nation-building that official bilingualism contemplates without unambiguous Supreme Court jurisprudence which likely made them all the more unwilling to interpret language rights in a bold and expansive manner. A more consistently liberal approach from the Supreme Court may have made these courts feel more confident that a purposive application of the language rights was permissible which may have led to a more liberal jurisprudence.

Before the advent of the Beaulac approach, a number of theories were put forth by language rights scholars attempting to explain why the Supreme Court had interpreted language rights so narrowly during the Acadiens era. Some of these theories could apply to the restrictive provincial court jurisprudence as well.[9] One such theory was suggested by Jonathan L. Black-Branch. Black-Branch speculates that Liberal and Conservative federal governments have deliberately appointed judges who were likely to be deferential to the legislatures in their language rights jurisprudence rather than developing bilingualism in an activist and purposive way.[10] He appears to suggest that the federal

government has sought to keep control over the development of bilingualism in the political process and has used its appointment power to ensure that this would happen. This hypothesis seems counterintuitive, as the federal government has a vested interest in appointing judges who would maintain and strengthen the official bilingualism unity strategy. However, if the theory was true, it would not only go a long way in explaining why the jurisprudence has been marked by so much restrictiveness, it would also explain the seemingly inexplicable failure of the federal government to appoint bilingualism-friendly judges to the courts in many cases. If this theory is indeed true and Ottawa has intentionally undermined one of the most important tenets of its unity strategy in order to maintain some degree of control for itself in the development of bilingualism, then it would appear that Canadians have been deceived simply for the purposes of power politics. As controversial as it may be, Black-Branch's theory does offer an explanation for the restrictive language rights interpretation and is therefore worthy of consideration.

Magnet has a similarly pessimistic view of the reason for the restrictiveness of the Supreme Court interpretation of language rights in the Acadiens era which could apply equally to provincial court jurisprudence of the last five years. His theory speculates that the Supreme Court sought to leave the development of bilingualism in the hands of the legislative process for purposes of the political optics in Québec.[11] He feels that the Supreme Court sought to avoid the perception in Québec of a federal institution trampling on provincial jurisdiction[12] which would lead to increased hostility on the part of Quebecers to Canadian federalism. Originally speaking only of the Supreme Court but with reasoning that could easily apply to federally appointed provincial courts as well, Magnet writes: "The Court was wrong – its reasoning hopelessly wrong. The results the Court produced are serious, creating strains in the Federation much worse than those the Court seems to fear."[13] If true, Magnet's hypothesis would explain the restrictiveness of the federally appointed courts, particularly those of Québec. However, Magnet goes further by suggesting that this refusal to interpret language rights purposively is simply part of the larger strategy of both the courts and governments in Canada on official language minority communities. The strategy, he explains, has not been to buttress these communities through the consistent enforcement of strong minority rights, but rather their palliation.[14] He argues that both governments and the courts do not seek the long-term

survival of these communities but rather to palliate their demise, to pacify them until they go away. He points to actions by the federal government which he feels prove its hostility to the long-term survival of the official language minority communities, such as its opposition to them in court.[15] While it is difficult to prove theories of this nature, Magnet's theory offers a possible reason for the federal government's failure to adequately support bilingualism in its judicial appointments.

Mandel has a theory related to the Acadiens approach which can be applied to the provincial court jurisprudence of the last five years as well. He argues that the Supreme Court reversed its course from the Blaikie liberal approach to the Acadiens approach so quickly in 1986 because just a few months previously, the separatist PQ had been defeated in Québec by the federalist Liberal party. With a party committed to a united Canada holding power in Québec, Mandel opines, the Court felt much less compelled to force official bilingualism upon the provinces and was content to let the 'legislative process' work for the advancement of bilingualism and the integration of the country.[16] This can be applied to the language politics debate of the last five years as well. It is possible that with low levels of support for sovereignty in Québec over the past five years and with little threat of another referendum from the PQ government, the courts have felt more at ease in adopting a restrained approach to language rights.[17] Perhaps the judiciary felt that the threat to national unity was limited at the time, which permitted them to enforce official bilingualism less rigorously.[18] If this theory is true, it indicates that even provincial courts behave highly strategically on contentious political issues like official bilingualism and that the jurisprudence of even these lower courts depends a great deal on political and social forces outside of the courtroom. This theory provides another interesting and plausible explanation for the more restrictive than liberal jurisprudence of the provincial courts in recent years.

Regardless of the reasons for the restrictiveness of recent provincial court language rights jurisprudence, to me, responsibility for it can clearly be laid at the feet of a number of institutions. In my mind, the primary responsibility for the failure of the provincial courts to advance bilingualism through their jurisprudence must be borne by the Supreme Court of Canada. Through its varied and unpredictable rights jurisprudence, the Supreme Court failed to develop a consistently liberal and purposive approach to language rights

that the lower courts could follow. By completely reversing its approach twice, the Court created a great deal of uncertainty in the law as to how language rights should be interpreted, uncertainty which was inevitably met by caution and apprehension in the lower courts' jurisprudence.

Particularly damaging in the Supreme Court's inconsistent jurisprudence was the Acadiens approach, an approach which has been widely criticized by most academic commentators as making little sense, an assessment with which I whole-heartedly agree. The approach deservedly garnered the groundswell of criticism it received. Nowhere in the text of the constitution or the purposes underlying the rights is such an approach detectable. The political compromises doctrine is a groundless and utterly unnecessary approach by which the Supreme Court imprudently abandoned official language minority communities and an important national unity strategy. However, Acadiens had a particularly significant effect on the provincial courts, as its restrictiveness was clearly evident in a number of lower court judgments for which the Supreme Court must bear full responsibility. Incredibly, however, the Supreme Court allowed this approach to stand as binding precedent for over a decade before it was finally righted by the Beaulac case. To me, the Acadiens approach itself and its inconsistency from the previous and subsequent approach sent a message to the lower courts that a narrow and literal interpretation of language rights is permissible regardless of what the consequences for national unity may be. It also sent a message that divergence from the purposive aims of the bilingualism policy was permitted in some cases, even if based on unconvincing logic (such as the political compromises doctrine). Such disrespect to the bilingualism policy regime and to the rights of official language minorities had to be extremely damaging to the long-term viability of the scheme. This restrictiveness and the inconsistency of the approach from the Supreme Court's other approaches contributed in no small way to the restrictiveness of the provincial court jurisprudence.

However, this is not the only reason why the Supreme Court deserves to bear a great deal of responsibility. While it appeared to have corrected its earlier mistakes with the establishment of the Beaulac approach, the Court failed to enforce its new approach by granting leave to appeal to litigants who had been subjected to restrictive language rights interpretation in the provincial courts. In our four sub-fields, the Court failed to

allow an appeal in five of six instances where one was sought.[19] The Court only granted leave to appeal in one case, the Peters case, in which it simply upheld the highly restrictive decision of the lower courts.[20] By failing to grant leave to appeal in five cases where it was sought, the Court failed to enforce its Beaulac approach and hold the lower courts to account as most of those five cases were restrictively decided. Cognizant of the lower courts' continued use of narrow interpretation and in some cases blatant flouting of the Beaulac precedent, the Supreme Court still refused to come to the aid of official language minority litigants, even to ensure that its own precedent was upheld. This may have been interpreted by the provincial courts as tacit approval of their restrictive interpretation or possibly that the Court's commitment to its Beaulac approach was not strong, both of which left the door open for further abuses. For these reasons, as well as those discussed above, the Supreme Court must therefore take primary responsibility for the restrictiveness of recent provincial court language rights jurisprudence.

Before leaving the subject of the Supreme Court's absence from the language rights disputes of recent years, the reasons for this absence are worth considering. I would suggest that the Court's refusal to hear any language cases in our sub-fields with one negligible exception indicates that it deliberately sought to avoid becoming involved in such cases, even at the expense of the upholding of its own precedent. It is possible that the Court feels that language rights cases are so controversial and have garnered it so much criticism in the past that it seeks to avoid ruling on such cases unless it is strategically advantageous, or absolutely necessary to do so. This willingness of the Court to wade into language rights issues only in strategic circumstances may be corroborated by the Beaulac decision. This opinion was, it will be recalled, a relatively uncontroversial and unnoticed decision, which the Court released on the same day as the highly contentious M. v. H. judgment. I would speculate that several members of the court, most notably Justice Bastarache, granted leave to appeal in Beaulac because they saw an opportunity to overturn the Acadiens approach and order institutional bilingualism for the criminal courts.[21] However, not wanting to attract controversy or rejuvenate the dormant language debate in Canada, the Court released Beaulac unceremoniously and has avoided most other language rights issues since then.[22] While these reasons are difficult to prove, the highly political and controversial nature of language rights and the national

unity debate in Canada is, in my mind, the most logical explanation for its avoidance of language rights issues. Regardless of the reasons for its behaviour, the Court's general unwillingness to involve itself in language rights issues in recent years suggests that it is behaving strategically, rather than in an apolitical fashion where it seeks only to properly uphold the law.

Returning to the discussion of who bears responsibility for the failure of language rights to reinforce the national unity strategy, for obvious reasons, significant responsibility also lies with the provincial courts themselves. In spite of the inconsistency of the Supreme Court's jurisprudence, the Beaulac judgment is clear in repudiating the Acadiens approach and mandating a liberal and purposive approach to language rights interpretation "in all cases." The fact that the provincial courts failed in a number of instances to properly apply this precedent is in my mind an inexcusable breach of a constitutional principle, by which lower courts are obliged to follow the precedents of superior courts. In those cases where Beaulac was not followed, the provincial courts took the law into their own hands and denied linguistic minority claimants the rights they are guaranteed by enforcing an overturned interpretive approach. Such an application of an explicitly overturned precedent represents the ultimate in judicial arrogance as the judges ignored precedent and applied the legal rule of their choice in order to achieve the results they sought. For this reason, the provincial courts deserve a great deal of the blame for the failure of the language rights/national unity strategy in recent years. The Québec Court of Appeal, the New Brunswick Court of Queen's Bench and to a lesser extent, the Ontario Superior Court of Justice deserve particular notoriety in this respect, as their jurisprudence was, generally, the most restrictive.

Governments, both provincial and federal, must also bear some of the responsibility for the restrictiveness of the jurisprudence. As we have seen, the federal government has done an extremely poor job of appointing judges to the courts who would interpret bilingualism liberally, for which it deserves a great deal of blame. However, in my mind, the provinces must also share some of the responsibility. With relative quiet on the national unity front, most of the provinces (with the exception of New Brunswick) have become somewhat complacent about bilingualism and have done little to strengthen it within their own jurisdiction in recent years. As (currently) the governments of all

provinces and territories are committed to national unity, I would suggest that these governments should do more to strengthen linguistic duality within their jurisdiction. National unity is an issue which obviously affects all Canadians and the attitude that appears to prevail in most provincial capitals at the moment (i.e. that unity is a federal government problem and that the provinces need do little to contribute to its solution) is indefensible and illogical.

In addition, in a number of language rights cases, provincial governments have actually opposed language rights claimants. Much more than simply being complacent about the development of bilingualism, such opposition by the provincial governments actually resists bilingualism's advancement. Provincial Attorneys-General and representatives of the Crown who are appointed by the provinces opposed the language rights claims of minority litigants in many of the cases we studied. The opposition to such claims creates an atmosphere of competition that is likely to engender distrust and hostility, all of which is unlikely to benefit the minorities. A more considerate approach to language rights issues, one which seeks their long-term development outside of the oppositional courtroom (rather than a reflexive defence of the policy status quo), would be more helpful to the linguistic minorities and would do more to strengthen bilingualism. For their opposition to language rights claims and their general lack of effort to advance bilingualism, provincial governments deserve to join the federal government in shouldering some of the blame for the failure of language rights to advance the official bilingualism strategy in our sub-fields.

While these institutions must all bear some responsibility for the restrictiveness of the provincial court jurisprudence, if maintaining national unity through language rights is still the objective in Canada, action must be taken by many of these same institutions in order to reverse the restrictiveness of the jurisprudence in the future. Perhaps no institution is more important in doing so than the Supreme Court. The best step that the Supreme Court could take would be to provide another language rights precedent in one of our four sub-fields which confirms the Beaulac approach. It is evident that a number of provincial court judges simply did not get the message from Beaulac and perhaps the only way to ensure that these recalcitrant jurists interpret language rights liberally in the future is to force yet another clear precedent upon them. While the Supreme Court

should not have to clarify what is meant by "in all cases," it appears that doing so is necessary. Such an additional precedent would not only reinforce the authority of the Beaulac approach but would also make the Acadiens approach increasingly unacceptable as the Court would have forbidden such restrictive reasoning in two decisive cases. Additional explicit guidance from the Court on the necessity of interpreting language rights liberally would be the best way to force the lower courts to do so in all cases, without exception.

Regardless of whether the top court issues another precedent confirming the Beaulac approach, the provincial courts need to interpret language rights more in line with that approach. If bilingualism is to be advanced in the future, the provincial courts must take the Beaulac approach more seriously and apply it consistently in their interpretation of linguistic disputes. Only through the application of the approach which seeks the purposive interpretation of language rights and the strengthening of linguistic minority communities can the bilingualism strategy hope to be effective in reinforcing national unity as federal policy makers had hoped. Such a more consistent application of Beaulac would have to begin in the senior provincial courts (those whose judges are appointed by the federal government) who are such important leaders in provincial jurisprudence and who have been especially restrictive in their language rights interpretation in the last five years. The Québec Court of Appeal in particular must begin to interpret language rights more liberally. In addition, the Supreme Court must hold the provincial courts to account to a greater extent by displaying an increased willingness to accept appeals of cases where minority language litigants have been victimized by narrow interpretations in provincial courts. Such greater accountability from the most senior court in Canada might compel the provincial courts to apply Beaulac more effectively. If there is to be any chance of maintaining national unity through language rights and official bilingualism in the future, it is imperative that both the provincial courts and the Supreme Court actively ensure that the Beaulac approach is consistently and unfailingly applied in the provincial courts.

The passage of additional language rights by both Ottawa and the provinces could also lead to greater success in the development of official bilingualism. While the federal government's ability to add language rights which effect areas of provincial jurisdiction

such as those dealt with in this study is limited, greater action in its own jurisdiction would provide leadership which might encourage (or put political pressure on) the provinces to follow suit. Perhaps more importantly, the passage of additional language rights by the provinces would not only provide additional protection to the minority language communities[23] but would also send a message to the judiciary that the provinces are serious about the development of bilingualism and expect the courts to be as well. The reinforcement of bilingualism through additional language rights would make the wishes of the legislatures increasingly evident to the courts who might respond by interpreting the rights more purposively. In particular, additional rights should be provided in the sub-fields of legislative bilingualism, bilingual government services and municipal bilingualism. The passage of new rights in these sub-fields might increase the importance of these fields relative to legal language rights (which have often been interpreted more restrictively). This could make the most important and wide-ranging language rights those which are of greater benefit to the entire linguistic minority *community*, rather than those exercised by individuals in courtrooms. Such initiatives by governments would likely do much to revitalize the bilingualism unity strategy.

The work of official language minority interest groups could also help lead to greater success for the official bilingualism strategy. In addition to lobbying the federal and provincial governments for the passage of more statutory language rights, such groups could lobby the provinces for more support for (and less opposition to) the claims of linguistic minorities in the courts. In addition, these groups could lobby Ottawa to give greater regard to the ramifications for official bilingualism of federal judicial appointments to provincial courts (especially to the Québec Court of Appeal). Perhaps lobbying for the inclusion of an 'official languages' seminar at the Canadian Judicial Centre (where federal appointees go for judicial education) would have an impact on the provincial court jurisprudence as well.[24] Most importantly, however, linguistic minority interest groups could play a greater role in the courtrooms than we have seen in our sub-fields in this study. While such groups are often found initiating or intervening in cases related to education rights, their presence in the fields we have examined was less ubiquitous. While such groups were by no means absent from our cases (see for example Boutin and Charlebois v. Moncton), they were not present in a few highly important

cases (such as Baie d' Urfé) which meant that their considerable legal resources and expertise were not brought to bear in situations when they could have been. By focusing their legal activity on the sub-fields of this study to a greater extent, these groups could likely have a favourable impact on the interpretation of language rights.

A final initiative that could be undertaken to revitalize the bilingualism strategy is that the Supreme Court could clarify some of the emerging issues in the provincial language rights jurisprudence. Such a clarification would have the effect of eliminating some of the uncertainty in the language rights jurisprudence which would mean that such uncertainty could no longer be used against minority language litigants. For example, while it is unlikely that the 'ratchet principle' would be acceded to by the Court as it appears relatively groundless in the constitutional text (although if the Court were to grant it any legitimacy whatsoever, it would be a major benefit for minority language litigants in the short term), the 'protection of minorities' principle could be expounded further, especially as it relates to language rights and linguistic minorities. A clarification as to how this foundational principle applies to legislation, whether it can be used to create new and substantive language rights obligations for the state and how the courts are to enforce it would all be useful to clarify the ambiguity and confusion that exists on this principle in the legal community. While any clarification would be welcome, an explanation which indicated that the principle can be used to create new obligations for the state and should be rigorously applied by the courts to protect linguistic minorities would be very beneficial for the bilingualism regime. Such an interpretation would strengthen the language rights considerably and give them new constitutional protection all of which would reinforce the bilingualism strategy significantly. A clarification of this and other issues in the language rights jurisprudence, as well as any or all of the other actions we have discussed would do much to reinforce and revitalize the language rights regime which has been weakened in recent years.

Final Thoughts

Although this has been a detailed examination of language rights jurisprudence in Canada, we have looked at only one piece of the language rights/official bilingualism/national unity puzzle. While we have seen that language rights have not always been interpreted liberally by the provincial courts in our sub-fields, we cannot

definitively conclude that all provincial language rights jurisprudence has been more restrictive than liberal. In order to make larger conclusions about the jurisprudence related to all language rights, more research is necessary.

Perhaps the most important follow-up research project that should be undertaken would be an examination similar to this but on jurisprudence related to minority language education rights. As this sub-field contains rights which relate very closely to culture and community (through the education itself as well as the community institutions which the minority schools represent), they are very important to the linguistic minorities and are thus a critical aspect of the national unity/language rights issue. An examination of the case law related to these rights would include not only an analysis of recent provincial court jurisprudence in this sub-field but also a recent Supreme Court decision (the Arsenault-Cameron judgment of 2000). In addition, such a study would require an analysis of a completely different set of Supreme Court interpretive approaches, as the Court has approached education rights and the rights of our sub-fields quite differently.

Another study that should be done would concern federally applicable language rights. Such a study could include bilingualism rights related to (among others) federal government services, federal courts, Parliament, the federal public service and other federal institutions, and possibly bilingualism in federally regulated industries. The national scope of these rights, their importance to the bilingualism scheme and the fact that the powerful federal government supports them makes these rights equally worthy of consideration. While the rights that we have studied in this examination are critically important, the other language rights are important as well and further research into the jurisprudence related to these sub-fields may allow us to draw larger and more definitive conclusions about the bilingualism national unity strategy.

Another research project that should be undertaken would be identical to this study, but would be done several years into the future. This examination has intentionally analyzed the jurisprudence of the early stages of the Beaulac era. While the jurisprudential results that we have seen are not encouraging for advocates of the development of bilingualism as a national unity strategy, it is possible that the results five or ten years hence would be very different. It may be that it is simply too early in the Beaulac era for the effects of the precedent to be felt completely and that a future study

along these same lines would reveal very different results. Such a continued examination and monitoring of language rights jurisprudence would not only be a valuable academic exercise, but would also be beneficial for the democratic consideration of the policy issues involved.

Whatever the result of future research, in this study we have discovered that since bilingualism and language rights were first introduced as a national unity strategy, the courts have not done all they could to ensure that the rights of the four sub-fields with which we have been concerned have been allowed to play the national unity role envisioned for them. Inconsistent Supreme Court interpretations of these rights as well as a more restrictive than liberal treatment of these rights in provincial courts in recent years have put the success of this strategy in grave jeopardy. However, the Beaulac precedent was a substantial watershed in the ongoing language rights narrative. In my mind, this is a major step in the right direction. While progress since the release of that decision has been limited, I feel that the courts still have an opportunity to use the decision to develop a jurisprudence which can lead to the strengthening of the official bilingualism strategy and possibly to the maintenance of national unity. The courts must choose, however, whether they wish to play the role in the solution to the national unity crisis designed for them by policy makers, or whether they are going to continue to form part of the problem through their narrow and restrained judgments. This decision is extremely important as the very integrity of the Canadian state and unity of the Canadian nation could be at stake.

NOTES

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[1] Latin, meaning 'to stand by decided matters.' Gerald L. Gall. The Canadian Legal System. (Fourth Edition. Scarborough: Carswell, 1995), 343.
[2] Ibid., 2.
[3] Ibid., 343.
[4] Russell (1987), 333.
[5] Gibson, 364-367.
[6] Interestingly, all four of these cases were decided by (different) provincial courts of appeal.
[7] Acadiens, at 566.
[8] While the empirical question of the importance of these legal rights is certain, what is less certain is whether this is salutary for bilingualism and official language minorities. As has been suggested elsewhere, the courts tend to be somewhat less controversial and attract less criticism than do other state institutions. This may be beneficial for national unity and the development of the bilingualism regime as a quiet and incremental development of the policy through the courts may prove to be less controversial and easier to accomplish than would a more overt development of the same rights through the legislatures. On the other hand, linguistic equality in the courts, while beneficial to some, is not as beneficial to the minority

community as are some other rights. Most people simply do not come into contact with the courts and thus would not need to avail themselves of their legal language rights, which would mean that the development of such rights would be much less useful to the maintenance of the community than would more frequently relied upon rights in other sub-fields (such as rights to municipal bilingualism). As well, these rights tend to be utilized only by individual litigants, rather than by the entire community and so are of less utility to the community as a whole.

[9] In addition to the theories discussed in this chapter, Réaume hypothesizes that the courts have avoided adopting an overly liberal interpretation of language because they worry that doing so would create rights to be understood in the minority language which would contradict others' rights to speak in their language. Such a case can be imagined in Québec if an English litigant were to have the right to have their trail conducted in English, thus forcing the French speaking prosecutor to switch to English in violation of their s. 133 rights. Réaume, 600. A larger discussion of Réaume's theory (and her critique of the Beaulac approach, which she feels did not go far enough because of this worry about competing language rights) is found in chapter two.

[10] Black-Branch, 183. Black-Branch is not alone in wondering if the federal government may have played a significant role in the establishment of the restrictive Acadiens approach. See Magnet (1995), 241 and Magnet (1990) 8. Magnet (1995), 241 notes that the factum of the federal Attorney General stated "a broad and generous interpretation [of language rights] cannot be used." In spite of complaints from the Liberal opposition in the House of Commons, then Prime Minister Mulroney refused to withdraw the government's factum. Magnet is particularly critical of this strategy because he suggests that the factums and opinions of the federal government are much more important than any other parties in the Supreme Court.

[11] Magnet (1995), 242.

[12] Ibid.

[13] Ibid., 243.

[14] Magnet (1990), 21.

[15] Magnet (1990 at 8) explains that the federal government intervened against the official language minority groups before the Supreme Court in both the Manitoba Language Rights Reference and the MacDonald cases, in the latter case, under intense opposition in the House of Commons not to do so.

[16] Mandel, 158-9. Indeed, the legislative process appeared to be doing just that, as within two years of the commencement of the Acadiens approach, the *Meech Lake Accord* was signed, which originally promised to unite Canada and put an end to linguistic tensions.

[17] Mandel summarises his theory in this way: "When the status quo of social power—in this case represented by the federalist forces battling independentism through a strategy of bilingualism—is threatened in the legislative arena, the courts will adopt an activist and interventionist approach to support the status quo. When conservative forces are in office, the courts will become passive and deferential." Mandel, 159.

[18] If this is true, it would, in particular, explain why the courts of Québec have been so restrictive.

[19] In four of these five cases, the decisions of the lower courts were restrictive. In the other case, Stadnick, the accused was granted some concessions, but sought additional concessions from the Supreme Court. The fact that four out of seven cases which were decided by provincial courts of appeal (as well as one that was decided by a lower court) were appealed to the Supreme Court is itself somewhat telling of the restrictiveness of the provincial courts in their language rights interpretation.

[20] The five cases for which the Court did not grant leave to appeal were Baie d'Urfé, Stadnick, Morand, Lavigne and Contenants Industriels. Interestingly, all of these cases (as well as the Peters case) were from Québec.

[21] Presumably assuming that the lower courts would follow the orders of the top court and do so which, we have seen, has not always been the case.

[22] The Court's only other significant language-related case was Arsenault-Cameron. I would suggest that this decision was also strategic though, as a school-bussing dispute from Prince Edward Island that only affected a few dozen families was likely seen by the Court as a safe bet to not cause a significant national language debate.

[23] More action to protect these communities is especially needed in western Canada, where official language minority rights are generally the weakest, as are the minority communities.

[24] According to F. L. Morton, the Canadian Judicial Centre was "established in 1988 to provide continuing education courses for judges." Liberal feminist groups have been very successful in ensuring that the

Centre provides seminars related to the issue of "gender bias in judging." Indeed, Morton indicates that "[m]ost of the materials used for these seminars have been prepared by law professors associated directly or indirectly with...a feminist legal action organization." F.L. Morton. Law, Politics and the Judicial Process in Canada. Second Edition. (Calgary: University of Calgary Press, 1992), 82. Such lobbying to have seminars on issues of concern to interest groups has become common in recent years.

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Appendix

Selected constitutional and statutory provisions related to language rights and language rights issues (in English, as available May 1st, 2004).

Constitution Act, 1867

92. In each Province the Legislature may exclusively make Laws in relation to Matters coming within the Classes of Subject next hereinafter enumerated; that is to say,

> 8. Municipal Institutions in the Province.
>
> 14. The Administration of Justice in the Province, including the Constitution, Maintenance, and Organization of Provincial Courts, both of Civil and of Criminal Jurisdiction, and including Procedure in Civil Matters in those Courts.

93. (1) Nothing in any such [education-related] Law shall prejudicially affect any Right of Privilege with respect to Denominational Schools which and Class of Persons have by Law in the Province and the Union.

96. The Governor General shall appoint the Judges of the Superior, District, and County Courts in each Province, except those of the Courts of Probate in Nova Scotia and New Brunswick.

133. Either the English or the French Language may be used by any Person in the Debates of the Houses of the Parliament of Canada and of the Houses of the Legislature of Quebec; and both those Languages shall be used in the respective Records and Journals of those Houses; and either of those Languages may be used by any Person or in any Pleading or Process in or issuing from any Court of Canada established under this Act, and in or from all or any of the Courts of Quebec.

The Acts of the Parliament of Canada and of the Legislature of Quebec shall be printed and published in both those Languages.

Constitution Act, 1982 (including the *Charter of Rights and Freedoms*)

1. The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

16. (1) English and French are the official languages of Canada and have equal rights and privileges as to their use in all institutions of the Parliament and government of Canada.

(2) English and French are the official languages of New Brunswick and have equality of status and equal rights and privileges as to the use in all institutions of the legislature and government of New Brunswick.

(3) Nothing in this Charter limits the authority of Parliament or a legislature to advance the equality of status or use of English and French.

18. (2) The Statutes, records and journals of New Brunswick shall be printed and published in English and French and both language versions are equally authoritative.

19. (1) Either English or French may be used by any person in, or in any pleading in or process issuing from any court established by Parliament.

(2) Either English or French may be used by any person in, or in any pleading in or process issuing from any court of New Brunswick.

20. (1) Any member of the public of Canada has the right to communicate with, and to receive available services from, any head or central office of an institution of the Parliament or government of Canada in English or French, and has the same right with respect to any other office of any such institution where

> (*a*) there is significant demand for communications with and services from that office in such language; or
>
> (*b*) due to the nature of the office, it is reasonable that communications with and services from that office be available in both English and French.

24. (1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

52. (1) The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.

Manitoba Act, 1870

23. Either the English or the French language may be used by any person in the debates of the Houses of the Legislature, and both these languages shall be used in the respective Records and Journals of those Houses; and either of those languages may be used by any person, or in any Pleading or Process, in or issuing from any Court of Canada established under the British North America Act, 1867, or in or from all or any of the Courts of the Province. The Acts of the Legislature shall be printed and published in both those languages.

Criminal Code of Canada

530. (1) On application by an accused whose language is one of the official languages of Canada, made not later than

...

a justice of the peace, provincial court judge or judge of the Nunavut Court of Justice shall grant an order directing that the accused be tried before a justice of the peace, provincial court judge, judge or judge and jury, as the case may be, who speak the official language of Canada that is the language of the accused or, if the circumstances warrant, who speak both official languages of Canada.

(2) On application by an accused whose language is not one of the official languages of Canada, made not later than whichever of the times referred to in paragraphs (1)(*a*) to (*c*) is applicable, a justice of the peace or provincial court judge may grant an order directing that the accused be tried before a justice of the peace, provincial court judge, judge or judge and jury, as the case may be, who speak the official language of Canada in which the accused, in the opinion of the justice or provincial court judge, can best give testimony or, if the circumstances warrant, who speak both official languages of Canada.

(3) The justice of the peace or provincial court judge before whom an accused first appears shall, if the accused is not represented by counsel, advise the accused of his right to apply for an order under subsection (1) or (2) and of the time before which such an application must be made.

(4) Where an accused fails to apply for an order under subsection (1) or (2) and the justice of the peace, provincial court judge or judge before whom the accused is to be tried, in this Part referred to as "the court", is satisfied that it is in the best interests of justice that the accused be tried before a justice of the peace, provincial court judge, judge or judge and jury who speak the official language of Canada that is the language of the accused or, if the language of the accused is not one of the official languages of Canada, the official language of Canada in which the accused, in the opinion of the court, can best give testimony, the court may, if it does not speak that language, by order remand the accused to be tried by a justice of the peace, provincial court judge, judge or judge and jury, as the case may be, who speak that language or, if the circumstances warrant, who speak both official languages of Canada.

530.1 Where an order is granted under section 530 directing that an accused be tried before a justice of the peace, provincial court judge, judge or judge and jury who speak the official language that is the language of the accused or in which the accused can best give testimony,

(*f*) the court shall make interpreters available to assist the accused, his counsel or any witness during the preliminary inquiry or trial;

(*g*) the record of proceedings during the preliminary inquiry or trial shall include

(iii) any documentary evidence that was tendered during those proceedings in the official language in which it was tendered.

Ontario Courts of Justice Act (1990)

125. (1) The official languages of the courts of Ontario are English and French.

126. (1) A party to a proceeding who speaks French has the right to require that it be conducted as a bilingual proceeding.

(2) The following rules apply to a proceeding that is conducted as a bilingual proceeding:

1. The hearings that the party specifies shall be presided over by a judge or officer who speaks English and French.

(5) A process issued in or giving rise to a criminal proceeding or a proceeding in the Family Court of the Superior Court of Justice or the Ontario Court of Justice may be written in French. 1994.

(6) On a party's request, the court shall provide translation into English or French of a document or process referred to in subsection (4) or (5) that is written in the other language.

Ontario Regulation 53/01 (2001)

4. If a defendant who is served with an offence notice, parking infraction notice or notice of impending conviction in a proceeding under the *Provincial Offences Act* gives notice under that Act of an intention to appear in court and, together with the notice of intention to appear, makes a written request that the trial be held in French, the defendant shall be deemed,

(a) to have exercised the right under subsection 126 (1) of the *Courts of Justice Act* to require that the proceeding be conducted as a bilingual proceeding; and

(b) to have specified that all future hearings in the proceeding shall be presided over by a judge or officer who speaks English and French.

Ontario French Language Services Act

1. In this Act, "government agency" means,

(a) a ministry of the Government of Ontario, except that a psychiatric facility, residential facility or college of applied arts and technology that is administered

by a ministry is not included unless it is designated as a public service agency by the regulations,

(c) a non-profit corporation or similar entity that provides a service to the public, is subsidized in whole or in part by public money and is designated as a public service agency by the regulations.

5. (1) A person has the right in accordance with this Act to communicate in French with, and to receive available services in French from, any head or central office of a government agency or institution of the Legislature, and has the same right in respect of any other office of such agency or institution that is located in or serves an area designated in the Schedule.

Schedule City of Ottawa. All.

New Brunswick Official Languages Act (2002)

1 In this Act...

"institution" means an institution of the Legislative Assembly or the Government of New Brunswick, the courts, any board, commission or council, or other body or office, established to perform a governmental function by or pursuant to an Act of the Legislature or by or under the authority of the Lieutenant-Governor in Council, a department of the Government of New Brunswick, a Crown corporation established by or pursuant to an Act of the Legislature or any other body that is specified by an Act of the Legislature to be an agent of Her Majesty in right of the Province or to be subject to the direction of the Lieutenant-Governor in Council or a minister of the Crown.

20(1) A person who is alleged to have committed an offence under an Act or a regulation of the Province or under a municipal by-law has the right to have the proceedings conducted in the language of his or her choice and shall be informed of that right by the presiding judge before entering a plea.

22 Where Her Majesty in right of the Province or an institution is a party to civil proceedings before a court, Her Majesty or the institution concerned shall use, in any oral or written pleadings or any process issuing from a court, the official language chosen by the other party.

31(1) Members of the public have the right, when communicating with a peace officer, to receive service in the official language of their choice and must be informed of that right.

36 A municipality or city to which subsection 35(1), (2) or section 37 applies shall offer the services and communications prescribed by regulation in both official languages.

Québec Charter of the French Language (2000)

29.1.

...

The Office shall recognize, at the request of the municipality, body or institution,

(1) a municipality of which more than half the residents have English as their mother tongue;

(2) a body under the authority of one or more municipalities that participates in the administration of their territory, where each such municipality is a recognized municipality.

Saskatchewan Language Act (2001)

11(1) Any person may use English or French in proceedings before the courts entitled as:

(b) the Provincial Court of Saskatchewan.